the fact that most citizen's petitions are filed less than six months from approval is telling: by raising concerns at the last minute, rather than early or midway through the approval process, these petitions clearly have the potential to extend the length of the generic approval process and delay market entry of generic competition.[79]

C. Product Hopping

As previously mentioned, once a generic enters the market, sales and profits for the brand-name counterpart drop significantly. Further, even in the event a physician prescribes a brand-name drug when a generic equivalent is readily available, brand-name manufacturers still do not benefit. Known as Drug Product Selection (DPS) laws, every state permits pharmacists to fill physician-prescribed brand-name drugs with the generic equivalent instead, provided there is a generic equivalent available for the prescribed brand-name drug.[80] While great for generic manufacturers, brand-name manufacturers had a response of their own: product hopping.

Recall that, through the Abbreviated New Drug Application pathway, the Hatch-Waxman Act eliminated the long and expensive clinical trial requirement for many generic drugs, instead only requiring proof that the new generic drug was both pharmaceutically equivalent and bioequivalent to the brand-name counterpart.[81] It then follows that if the brand-name manufacturer alters the formulation of the drug such that a new version is no longer

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[79] *Id.* To further expand on this point, the FDA employs a 180-day time limit for responding to citizen's petitions. This 180-day period—which equates to six months—aligns with the category in which potentially delaying petitions were filed, that between 0-6 months before generic approval. This strongly supports the conclusion that many of the citizen's petitions may be the last barrier to final generic approval. *Id.* at 77.

[80] *See* Jessie Cheng, *An Antitrust Analysis of Product Hopping in the Pharmaceutical Industry*, 108 COLUM. L. REV. 1471, 1479 (2008); *see* Alison Masson & Robert L. Steiner, FTC, Generic Substitution and Prescription Drug Prices: Economic Effects of State Drug Product Selection Laws 1 & n.l; *see* Bureau of Consumer Prot., FTC, Drug Product Selection 155-62 (1979) (examining the differences between major types of state DPS laws); *see also* Eric L. Cramer 8c Daniel Berger, *The Superiority of Direct Proof of Monopoly Power and Anticompetitive Effects in Antitrust Cases Involving Delayed Entry of Generic Drugs*, 39 U.S.F. L. REV. 81, 116 n.116 (2004) (distinguishing state DPS laws that merely permit pharmacists to substitute generics for brand-name drugs from state DPS laws that require pharmacists to substitute generics).

[81] Drug Price Competition and Patent Term Restoration Act, Pub. L. No. 98–417, § 101, 98 Stat. 1585, 1585–92 (1984) (codified as amended at 21 U.S.C. § 3550) (2012)).

bioequivalent to the old version, the brand-name manufacturer creates a situation where the generic drug of the old formulation is also not bioequivalent to the new formulation either.[82] Thus, because the new brand-name drug and the generic drug are no longer bioequivalent, pharmacists are no longer able to substitute the generic equivalent for the brand-name drug when physicians prescribe the brand-name drug.[83] To further suppress the generic, if the brand-name manufacturer kills demand for its old formulation—meaning physicians no longer prescribe it—the brand-name manufacturer likewise kills demand for the rival generic.[84]

When the brand-name manufacturer alters the formulation of its drug, the generic manufacturer has limited options, each with only mild benefits. First, in the effort to continue benefiting from the valuable sales-generating option that is generic substitution, the generic manufacturer can follow the "hop," developing a new generic version of the new formulation. However, this requires starting the drug development process from square one again: the generic manufacturer must first develop the generic version of the new formulation and then proceed through the ANDA approval process again.[85] By subjecting the generic manufacturer to the relatively time-consuming approval process for a second time—and potentially a new round of patent litigation—the brand-name "product hopper" enjoys several more years of insulation from generic competition, leading to sizable gains.[86] Even if the generic manufacturer is successful in "hopping" to the new formulation, nothing is stopping the brand-name manufacturer from

[82] *See* Cheng, *supra* note 80, at 1488.
[83] *Id.*; *See also* Guy V. Amoresano, *Branded Drug Reformulation: The Next Brand vs. Generic Antitrust Battleground*, 62 FOOD & DRUG L.J. 249, 251 (2007) (describing that the "reformulation strategy . . . prevents [generic] drug[s] from being dispensed by pharmacists as an AB-rated substitute to fill prescriptions written for the brand drug [when the new formulation is prescribed]").
[84] *See* Cheng, *supra* note 80, at 1488. This is because the generic drug no longer receives benefit of the state DPS law.
[85] *Id.* For a broader overview of the process, see *supra* notes 22–26 and accompanying text.
[86] *Id.* Recall, if the brand-name manufacturer induces patent infringement litigation in a timely manner, it can trigger a thirty month stay, barring the generic manufacturer from the market. 21 U.S.C. § 355(j)(5)(B)(iii) (2012); *see also* Hemphill, *supra* note 42, at 1566 (explaining how the delay may last more than three years).

"hopping" again onto a third formulation, requiring the generic manufacturer to repeat the approval for a third time.[87] A second, alternative approach to following the product hop involves the generic manufacturer selling its version of the old formulation under its own separate brand name.[88] However, as the ensuing example will demonstrate, it is not common for the generic manufacturer's branded version of the old formulation to succeed, as the generic manufacturer's advertising and marketing abilities commonly pale in comparison to the rival brand-name manufacturer's abilities.[89]

In 1998, Abbott Laboratories, with assistance from Fournier Industrie et Sante, marketed TriCor, the branded version of the cholesterol-lowering drug fenofibrate.[90] Then, only one year later in 2000, Teva Pharmaceutical, a generic manufacturer, filed its own ANDA, looking to launch its own generic into the market. Likely in response to the ANDA filing, Abbott and Fournier in 2001 altered the TriCor formulation, changing the product from a capsule to a new tablet formulation. Additionally, the original capsule formulation was removed by Abbott and Fournier from the market, meaning Teva's generic, which was an equivalent of the original capsule formulation, could not receive the benefit of state DPS laws.[91] Through the product hop, Abbott and Fournier had successful prevented Teva from benefiting from generic substitution of TriCor.[92]

[87] *See* Cheng, *supra* note 80, at 1489.
[88] *Id.* at 1495.
[89] *Id.* Because brand-name pharmaceutical manufacturers typically have far greater resources available than the generic counterpart, the brand-name manufacturer easily diverts consumers to its new formulation, instead of the branded generic released by the generic manufacturer.
[90] *Id.* at 1491. TriCor was highly successful, with annual sales hovering around $750 million per year. *Id.*
[91] *Id.* at 1492.
[92] Had Abbott and Fournier not altered the formulation of TriCor, then whenever TriCor was prescribed by physicians, Teva would receive benefit of the DPS laws, resulting in its generic being substituted in place of the branded TriCor.

However, Teva did not backdown easily: electing the first option mentioned above, Teva followed the hop itself and again applied for FDA approval, this time in 2002.[93] Then, like before, Abbott and Fournier hopped again, this time developing a new tablet formulation for TriCor that did not need to be taken with food.[94] Again removing the old formulation from the market, Abbott and Fournier were successful in hindering the competition, with nearly 100% of patients on the old formulation switching to the second, new formulation.[95] Instead of following the hop a second time, Teva elected the second option mentioned above and decided to market the generic formulation under its own brand name, Lofibra.[96] However, due to its limited marketing ability coupled with the lack of generic substitution, Teva's sales of Lofibra were a fraction when compared to Abbott's and Fournier's sales: only about $4 million per year. [97]

Having effectively eliminated generic competition, Abbott and Fournier highlight the anticompetitive nature of product hopping while also showing the extent to which brand-name pharmaceutical manufacturers will go to prevent generics from entering the market.[98] The problem in preventing this type of behavior is that brand-name manufacturers are under little legal obligation to help their generic competitors by restricting formulation changes that in theory better meet consumer preferences.[99] Further, a brand-name manufacturer is under no obligation to continuing the sale of old formulations of its drugs.[100]

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[93] *Id.* at 1493.
[94] *Id.*
[95] *Id.*
[96] *Id.* This action taken by Teva was necessary as, similar to before, it could no longer rely on generic substitution to fuel sales because Abbott's and Fournier's new formulation was no longer bioequivalent to Teva's second generic.
[97] *Id.*; *see also* Abbott Labs. v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408, 416 (D. Del. 2006).
[98] Importantly, Abbott's and Fournier's actions did not escape antitrust scrutiny. *See* Abbott Labs., 432 F. Supp. 2d at 408. In opting against a per se legal approach in determining the legality the product hopping, the Court instead weighed the modification's anticompetitive effects to see if they outweighed its benefits. *Id.* at 422. Thus, like challenges to the pay-for-delay agreements, product hopping issues tend to result in lengthy and expensive litigation.
[99] *See* Cheng, *supra* note 80 at 1494.
[100] *Id.* at 1495. *See also* Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1216 (9th Cir. 1997) (highlighting that there was "no reported case in which a court has imposed antitrust liability for a unilateral refusal to sell or license a patent or copyright"); In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1326 (Fed. Cir.

D. Authorized Generics

To achieve its goal of increasing the number of generic pharmaceuticals on the market, the Hatch-Waxman Act, through its central incentive—the 180-day exclusivity period awarded to the first generic manufacturer to file a Paragraph IV certification and win regulatory approval—has achieved success.[101] However, that is not to say the Hatch-Waxman Act is without flaw: the 180-day exclusivity period has a significant carve-out, that of the brand-name manufacturer itself.[102] By simply notifying the FDA—neither an Abbreviated New Drug Application or separate New Drug Application is required—the brand-name manufacturer is able to side-step the generic manufacturer's 180-day exclusivity period and create direct competition in the generic market immediately via use of the "authorized" generic.[103]

At first glance, one might see no harm in allowing these "authorized" generics—generic versions of brand-name drugs coming directly from the brand-name manufacturer itself—to encroach on one of the most significant benefits to being the first generic manufacturer to enter the market. After all, the introduction of not one, but two generic versions of the branded drug only seems to spur competition in the market, not hinder it. While it does seem strange that a unique carve-out has been given to brand-name manufacturers—who already possess significant

2000) (holding that patent holders are immune from antitrust claims for their refusals to license or use their patent rights).

[101] *See* Feldman, *Captive Generics*, *supra* note 1, at 390. In 1995, 43% of all dispensed prescription drugs were generics. This number increased to 89% in 2016, showcasing how the Hatch-Waxman Act has altered the pharmaceutical landscape since its inception. *Id.*

[102] *Id.* This was not without challenge, however. In 2004, Teva Pharmaceuticals and Mylan, both generic drug manufacturers, filed petitions with the FDA that requested the agency prohibit distribution of generics produced by the brand-name manufacturers during the 180-day exclusive period. After the FDA rejected the petitions, two legal challenges followed. *Id.* at 391. The Court of Appeals for the D.C. Circuit agreed with the FDA's interpretation of the Hatch-Waxman Act, holding that the Act does not prohibit New Drug Application holders from marketing captive generics during the exclusivity period. Teva Pharm. Indus. Ltd. v. Crawford, 410 F.3d 51, 55 (D.C. Cir. 2005). Similarly, the Court of Appeals for the Fourth Circuit affirmed that the Hatch-Waxman Act does not give the FDA the power to ban generics produced by the brand-name manufacturer during the 180-day exclusivity period. Mylan Pharm., Inc. v. U.S. Food and Drug Admin., 454 F.3d 270, 271 (4th Cir. 2006). With *Teva* and *Mylan* both backing the FDA, federal courts helped cement authorized generics as a fixture in the pharmaceutical industry.

[103] *Id.*

leverage—should it matter that the source of the "authorized," and second generic on the market, is the brand-name manufacturer itself, and not another purely-generic manufacturer?

The simple answer is yes, it does matter that the source of the generic is the brand-name manufacturer itself. First, when comparing drug markets containing an authorized generic with those markets that do not, the markets with the authorized generic tend to have increased prices for both the generic and brand-name version of the drug.[104] While brand-name drug prices tend to increase over time due to natural inflationary effects—whether or not an authorized generic is present in the market—it appears the presence of an authorized generics accelerates the price increase significantly.[105] Second, and more concerning, the presence of an authorized generic generally inflates the price of the generic competitors in its first three years on the market, resulting in markedly higher generic drug prices for consumers.[106] Clearly the presence of a direct generic competitor decreases sales of the true generic. Thus, in order to compensate for the lower sales, a higher price is necessary.[107]

Along with the effects on net generic prices, the presence of an authorized generic tends to alter the composition of generic drug markets.[108] It was found that as other true generics are approved and launched into a particular drug market, they cut into other true generics'—and not the authorized generic's—market share, leaving the authorized generic's share unaltered.[109] This

[104] *See* Feldman, *Captive Generics*, *supra* note 1, at 415.
[105] *Id.* at 416. When an authorized generic was not present in a particular market, the brand-name drug net price rose an average of 6% in the first three years following the launch of a true generic. Conversely, when an authorized generic was present, the growth in the net price of the brand-name drug increased to 21%. *Id. See also* Inmaculada Hernandez, Alvaro San-Juan-Rodriquez, Chester B. Good & Walid F. Gellad, *Changes in List Prices, Net Prices, and Discounts for Branded Drugs in the US, 2007-2018*, 323 JAMA 854, 854 (2000) (researching the changes in brand-name drug net prices from 2007 through 2018).
[106] *See* Feldman, *Captive Generics*, *supra* note 1, at 416. In the first year, true generics generally saw an increase of around 11% due to the presence of an authorized generic. The price of the true generic generally saw an additional 4% increase in net price when an authorized generic was available. *Id.*
[107] *Id.* at 417.
[108] For example, generic manufacturers generally saw a 22% decrease in combined market share over the first three years due to presence of an authorized generic. *Id.* at 408.
[109] *Id.*

strongly suggests authorized generics are better than true generics at penetrating such markets, likely due the sales and marketing relationships cultivated through their brand-name drugs and market prowess. Thus, it is evident that the presence of authorized generics in generic drug markets has undesirable effects, with the most concerning being the effect on generic drug prices.

IV. MOVING FORWARD

As discussed in Part III.A, the Supreme Court opened pharmaceutical manufacturers up to antitrust liability when evaluating pay-for-delay settlements, even when they fell within the scope of the exclusionary potential of a patent.[110] However, it is not clear that the standard for evaluating behavior under the Sherman Act—the Rule of Reason test—is a meaningful limit on brand-name manufacturers engaging in anti-competitive behavior.[111] By simply not offering cash, it appears brand-name manufacturers may be successful in side-stepping the restrictions implemented by the courts.[112]

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[110] *See* FTC v. Actavis, Inc. 570 U.S. 136 (2013).

[111] Some commentators have described the Rule of Reason test as complex and burdensome, placing a high burden on the plaintiff. *See* Feldman, *Pricetag*, *supra* note 42, at 13. Although some do argue that *Actavis* has resulted in the end of pay-for-delay, others note that *Actavis* only further incentivized pharmaceutical manufacturers to create more complex agreements in the effort to sidestep antitrust scrutiny. *See* Lauren Krickl & Matthew Avery, *Roberts Was Wrong: Increased Scrutiny After* FTC v. Actavis *Has Accelerated Generic Competition*, 19 VA. J.L. & TECH. 510, 547 (2015); *see also* Feldman, *Pricetag*, *supra* note 42, at 12. Some argue that the FTC's observation of a decline in anticompetitive pay-for-delay agreements post-*Actavis* largely stemmed for its inability to categorize most settlements between brand-name and generic manufacturers, not because the actual number of agreements was declining. *See* Robin Feldman & Prianka Misra, *The Fatal Attraction of Pay-for-Delay*, 18 CHI.-KENT J. INTELL. PROP. 249, 260–65 (2019).

[112] Because of the way lower courts have applied the language of *Actavis*, a plaintiff is generally required to show that the generic manufacturer agreed to not use the patented, brand-name drug and that the generic manufacturer received an unexplained payment from the brand-name manufacturer. Thus, alternative agreements that achieve the same anti-competitive outcomes may pass through the courts without challenge due to cleverly drafted contracts that do not allow for unexplained payments from the brand-name manufacturer. *See* Aaron Edlin, Scott Hemphill, Herbert Hovenkamp & Carl Shapiro, *Activating Actavis*, 28 ANTITRUST 16, 18 (2013). For example, the brand-name manufacturer could "overpay" the generic manufacturer for marketing services the generic manufacturer is not equipped to tender, much like Solvay's agreements with Actavis, Paddock, and Par. Additionally, the brand-name manufacturer could allow the generic manufacturer to make and sell other drugs in its portfolio, thus diverting the competition to a different drug market. *See* Feldman, *Pricetag*, *supra* note 42, at 15. Further strategies include leveraging the threat of introducing an authorized generic to compete directly with the generic manufacturer's drug during the 180-day exclusivity period. By agreeing not to market its own generic, the brand-name manufacturer

As discussed in Part III.B, the citizen's petition system allows for the possibility of abuse by pharmaceutical manufacturers, warping the system meant to serve as a check on the FDA into a method of delaying competition. The challenge is distinguishing petitions raising valid concerns from those that only carry the appearance of validity and nothing more. Thus, absent change to the current system, petitions filed for the purpose of delaying entry of generic competition are free to exist without penalty to those that file them.[113]

As discussed in Part III.C, product hopping by brand-name manufacturers seriously undercuts the success of a generic drug once launched on the market, forcing generic manufacturers to adapt or risk being left behind. Further, brand-name manufacturers are under little legal obligation to help their generic competitors by restricting formula changes, nor are they under any obligation to continue the sale of old formulations of the branded drugs after a new formulation has been developed.[114] Thus, actions outside the judiciary are essential to curb the practice.[115]

As discussed in Part III.D, the Hatch-Waxman Act's failure to prevent brand-name manufacturers from launching their own generics into the market during the 180-day exclusivity period awarded to the first generic filer poses unique threats to the composition of generic drug

effectively pays for the generic manufacturer's delay into the market. *See generally* Feldman, *Captive Generics*, *supra* note 1.

[113] Although the FDA does have the power to summarily deny any petition filed with the primary purpose of delaying generic approval if the petition does not also raise valid scientific or regulatory concerns, it is not difficult for petitioners to weave seemingly valid concerns into the petitions. Further, it is not common for the FDA to summarily deny petitions, failing to do so even once from 2007 through 2014. *See* 21 U.S.C. §355(q)(1)(E) (2012); *see also* Feldman, *Citizen's Pathway Gone Astray*, *supra* note 3, at 88.

[114] *See* Cheng, *supra* note 80, at 1494. *See also* Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1216 (9th Cir. 1997); In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1326 (Fed. Cir. 2000).

[115] Although brand-name manufacturers still are open to antitrust litigation, because of courts' failure to apply a per se rule against product hopping, any attempts to police brand-name manufacturers' actions will require significant resources, in the form of time and money. *See* Abbott Labs. v. Teva Pharms. USA, Inc., 432 F. Supp. 2d 408 (D. Del. 2006).

markets. Given that the interpretation of the Hatch Waxman Act seems settled,[116] like that of product hopping, actions outside the judiciary are necessary to resolve the issue.

A. Disclosure as the First Step

From pay-for-delay agreements to questionable citizen's petitions to product hopping and finally authorized generics, it is clear brand-name pharmaceutical manufacturers are willing to go to great lengths to prevent competition from entering the market. The benefit to the brand-name manufacturers is so great, that—in the words of one expert on the topic— "significant effort by competition authorities" is required to prevent the issues.[117] However, given that brand-name pharmaceutical manufacturers possess great leverage coupled with tremendous resources, they have the unique ability to bend and adapt in response to whatever the judiciary or legislature throws their way. Thus, in order to begin to remedy the higher prices caused by the anticompetitive tactics discussed, more specific and detailed information on each of the four issues is required. The following text outlines legislative and regulatory solutions meant to help remedy all four issues discussed.

Outside the obvious band-aid type legislative solutions that immediately address the raised issues,[118] the crucial first step towards eliminating the anticompetitive practices altogether

[116] *See* Teva Pharm. Indus. Ltd. v. Crawford, 410 F.3d 51, 55 (D.C. Cir. 2005) (holding that the Hatch-Waxman Act does not prohibit New Drug Application holders from marketing captive generics during the exclusivity period); *see* Mylan Pharm., Inc. v. U.S. Food and Drug Admin., 454 F.3d 270, 271 (4th Cir. 2006) (holding the Hatch-Waxman act does give the FDA the power to ban generics produced by the brand-name manufacturer during the 180-day exclusivity period).

[117] *See* Feldman, *Pricetag*, *supra* note 42, at 43.

[118] To curb the practice of pay-for-delay, the incentive structure of the Hatch-Waxman Act could be altered. For example, legislation could be enacted that strips the first generic filer of the 180-day exclusivity period in the event that patent infringement between the brand-name and generic manufacturer settles. *See* Feldman, *Pricetag*, *supra* note 42, at 46–47. To curb the practice abusive citizen's petitions, a simple ban preventing competitors from filing citizen's petitions related to generic applications would solve the issue. *See* Feldman, *Citizen's Pathway Gone Astray*, *supra* note 3, at 86–87. To curb the practice of product hopping, alterations to state DPS laws could provide for approved generics to still receive the benefit of the DPS laws with respect to the new formulations of the brand-name drug, provided the reason for the formula alteration was not due to some underlying problem with the original. To curb the practice of brand-name manufacturers released authorized generics during the first-filer generic's 180 exclusivity period, legislation could be enacted that simply prohibits brand-name manufacturers from releasing their

is robust transparency mandates. Whether achieved through legislative or regulatory action, by forcing pharmaceutical manufacturers to reveal information whenever engaging in an action related to the release of a drug into the market, critical insight on the various anticompetitive practices will be gained.[119] Thus, by shining a light directly on the actions of brand-name manufacturers, legislators and regulators will then have the knowledge to cure the current anticompetitive practices while—more importantly—also remaining flexible to bend and adopt to any future anticompetitive practices devised in response to future changes in the law.

Similar to how original proponents of federal securities legislation observed something was adrift with unregulated public company disclosure practices,[120] the current opacity of information with regard to pay-for-delay settlements, citizen's petitions, product hopping, and authorized generics accentuates failures in pharmaceutical markets.

For example, by requiring strict disclosure requirements whenever a brand-name manufacturer settles an infringement lawsuit with a generic manufacturer, concrete data regarding the value of the agreement and the drug products at issue will become easily accessible. This in turn will fuel outside investigators, like antitrust enforcers and civil attorneys, that will hold the brand-name manufacturers accountable for their anticompetitive tactics. Similarly, increased information will help curb abusive citizen's petitions by allowing the FDA

generics into the market during the time. *See* Feldman, *Captive Generics*, *supra* note 1, at 420–21. Although the aforementioned solutions would have immediate effects, with time, pharmaceutical manufacturers will likely devise methods for curtailing the solutions. Thus, solutions that cut to the root of the issue are necessary to completely prevent the issues.

[119] Additionally, increased disclosure will result in increased public scrutiny of pharmaceutical manufacturer's actions. Although pharmaceutical companies generally are already under a microscope by the public and lawmakers, it is clear the current disclosure requirements are insufficient for drawing necessary information to effectively circumvent the issues. *See* Feldman, *Drug Wars*, *supra* note 2 and accompanying text; *see also* Feldman, *Pricetag*, *supra* note 42, at 47.

[120] *See generally* Michael D. Guttentag, *An Argument for Imposing Disclosure Requirements on Public Companies*, 32 FLA. ST. U. L. REV. 123 (2004).

to quickly dismiss those that lack merit.[121] With respect to product hopping, explicit acknowledge by brand-name manufacturers of the effects of minute formulation changes will draw scrutiny, while also drawing increased awareness of the practice.[122] And lastly, detailed information highlighting every connection a brand-name manufacturer has with the corresponding generic market for its brand-name drug will provide invaluable information for legislators and regulators to craft law ensuring the integrity of generic drug markets.[123]

In addition to the benefits gained from the specific information disclosed, the requirement of disclosure itself serves as an important check on pharmaceutical companies. As evidenced in federal securities law, a failure to comply with the disclosure requirements allows individual investors to bring direct civil lawsuits to hold the company's managers in check.[124] Applying this theory to the proposed disclosure requirements for pharmaceutical manufacturers, a failure to comply with such disclosure requirements will open the manufacturer up to civil liability. Further, the mere failure to comply will prove valuable by providing outside investigators with easy targets to scrutinize and challenge. Thus, brand-name manufacturers will have a great inventive to comply to avoid further scrutiny.

[121] Additionally, regulation allowing the FDA to impose penalties on citizen's petitions that lack merit would further strengthen the disclosure requirement, reducing the number of citizen's petitions that have the potential for generic delay.

[122] Further, disclosure requirements by generic manufacturers with respect to the number of sales generated from state DPS laws will provide increased ammunition for outside investigators to bring lawsuits holding brand-name manufacturers to account for their actions.

[123] Although a generic directly authorized by the brand-name manufacturer is the most explicit example of a brand-name manufacturer's influence on the generic market, increased information will help shine light on other more complex and nonobvious arrangements—like multi-company licensing arrangements touching other drugs in a brand-name manufacturer's portfolio—currently in place. Then, once the true scope of the issue is evident, further legislation and regulation is possible.

[124] *See generally* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

B. Limitations

First, legislation or regulation mandating robust disclosure requirements will not lead to immediate solutions. Moreover, it will likely take years of disclosure to properly craft specialized legislation and regulations that eradicate the anticompetitive practices altogether. Thus, in the meantime, brand-name manufacturers remain free to engage in the anticompetitive practices, with consumers suffering in the form of increased drug prices.

Second, increased disclosure requirements will increase operating and litigation costs on pharmaceutical manufacturers. Much like how publicly traded companies are subject to the added cost of producing audited financial documents, pharmaceutical manufacturers will incur higher legal costs to ensure compliance with the disclosure requirements. Similarly, any instance of suspected non-compliance will result in costly litigation expenses for the manufacturers. This in turn will result in higher drug prices for consumers to compensate for the added costs.

V. CONCLUSION

The Hatch-Waxman Act relies on a series of important incentives to achieve its goal of promoting generic competition in pharmaceutical markets while simultaneously balancing brand-name manufacturers' interest in profit. Although profit motive is a powerful incentive for innovation, it also incentivizes those with leverage—the brand-name manufacturers—to hijack the system directly responsible for their decreased profits by means of generic drug competition. Instead of facilitating the end of improper pharmaceutical patents, mutually beneficial pay-for-delay agreements are entered into that only serve to keep brand-name drug prices higher for longer. Instead of accepting defeat, the citizen's petition process is warped to further delay generic entry in any way possible. Instead of pursuing real innovation, resources are devoted to creating trivial variations in drug composition to eliminate generic competitors. And finally,

instead of allowing true competition, authorized generics are launched to alter the composition of generic drug markets.

As one expert in the field noted, "the law must become as nimble and creative as these complex schemes."[125] Thus, to discourage the increasingly complex anticompetitive maneuvers by brand-name manufacturers, increased and recurring information is essential. By shining light directly on the harmful tactics and drawing scrutiny upon companies that employ such tactics, the stage for future change is set. Only then will the anticompetitive practices be ended once and for all.

[125] *See* Feldman, *Pricetag*, *supra* note 42, at 48.

Applicant Details

First Name	**Elizabeth**
Middle Initial	**G**
Last Name	**Underwood**
Citizenship Status	**Persons who owe "allegiance to the United States" (e.g., nationals of American Samoa, Swains Island, and Northern Mariana Islands, and nationals who meet other requirements describe in 8 U.S.C. Â§ 1408)**
Email Address	**underwood.e24@law.wlu.edu**
Address	**Address** **Street** **30 S. Main St. Unit B** **City** **Lexington** **State/Territory** **Virginia** **Zip** **24450** **Country** **United States**
Contact Phone Number	**9016529822**

Applicant Education

BA/BS From	**Washington & Lee University**
Date of BA/BS	**May 2020**
JD/LLB From	**Washington and Lee University School of Law** **http://www.law.wlu.edu**
Date of JD/LLB	**May 10, 2024**
Class Rank	**30%**

Law Review/ Journal	**Yes**
Journal(s)	**Journal of Civil Rights and Social Justice**
Moot Court Experience	**Yes**
Moot Court Name(s)	**W&L John W. Davis Appellate Advocacy Competition** **W&L Robert J. Grey, Jr. Negotiations Competition** **W&L Mock Trial Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Belmont, Elizabeth
belmontb@wlu.edu
Eggert, David
eggertd@wlu.edu
540-458-8335
Hammond, Lethia
hammondl@wlu.edu
540-928-2150

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Elizabeth Underwood

30 S. Main St. Apt. B | Lexington, VA 24450 | 901.652.9822 | underwood.e24@law.wlu.edu

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker,

As a rising third-year student at Washington and Lee University School of Law, I would be honored to begin my career in the legal field serving as your law clerk. Having completed my undergraduate studies in Virginia, I hope to remain in Virginia and contribute my legal skills, gain firsthand experience of the workings of the federal court, and learn from your expertise and high standards of excellence.

This summer, I am interning at the Securities and Exchange Commission (SEC) Office of International Affairs in Washington, D.C. My duties include conducting legal research on complex international securities law issues, drafting memoranda on regulatory developments and legal trends, and assisting in enforcement proceedings. This previous semester, I completed my student note, which explores the implications of the Global Magnitsky Act for parties involved in the persecution of the Uyghur population. These experiences together will refine my writing skills and allow me to efficiently research and write on complex legal issues, communicate my findings, and recommend resolutions.

Throughout my judicial internship last summer, I had the opportunity to observe civil hearings, criminal trials, and sentencings, furthering my understanding of how to effectively advocate on behalf of my client's interests and successfully applying those insights to W&L Moot Court competitions. My work included drafting memoranda, editing draft opinions on both civil and criminal matters, and resolving cases such as pro se prisoner claims. By actively participating in discussions within the chambers about ongoing cases and legal matters, I gained invaluable insights into the operational intricacies and collaborate dynamics essential for a law clerk to navigate effectively.

My previous experience in chambers confirmed my aspiration to become a litigator, and I am confident that my strong work ethic, attention to detail, and ability to work independently and collaboratively would make me a valuable asset. I look forward to speaking more about the clerkship position and my previous experiences soon. Thank you for considering my application.

Sincerely,

Elizabeth Underwood

Elizabeth Underwood

30 S. Main St. Apt. B | Lexington, VA 24450 | 901.652.9822 | underwood.e24@law.wlu.edu

Education

Washington and Lee University School of Law, Lexington, VA **August 2021 – Present**
J.D. Candidate, May 2024 | Cumulative GPA: 3.579 (Top 30%) | Semester GPA: 3.835 (Top 10%)

- Honors: Campaign 1995 Scholarship
- Leadership: Vice-Chair, W&L Moot Court Board; Lead Articles Editor, *Journal of Civil Rights and Social Justice*
- Activities: Runner-Up, Mock Trial Competition (46 competitors); Finalist, Robert J. Grey, Jr. Negotiations Competition (top 4 of 47); Semifinalist, John W. Davis Appellate Advocacy Competition (top 8 of 48); Law Ambassador
- 3L Externship: The Honorable Robert M.D. Turk, Montgomery County (VA) Circuit Court

Harvard Business School Online **November 2020 – March 2021**

- Completed Credential of Readiness program comprised of three courses: business analytics, economics for managers, and financial accounting

Washington and Lee University, Lexington, VA **August 2016 – May 2020**
B.A., Strategic Communication, East Asian Languages and Literature (Chinese Emphasis)

- Honors: Critical Language Scholarship Alternate Finalist for Chinese, Certificate of International Immersion
- Activities: Chinese and English to Speakers of Other Languages (ESOL) academic peer tutor, Ring-Tum Phi staff writer, University Singers soprano 2 and public relations chair, fall musical performer

Experience

U.S. Securities and Exchange Commission, Washington, D.C. **June – Present**
Student Honors Law Program Intern, Office of International Affairs

U.S. District Court for the Western District of Tennessee, Memphis, TN **May – July 2022**
Judicial Intern for the Honorable Sheryl H. Lipman

- Conducted legal research, drafted chambers memorandums, and wrote orders on pro se prisoner claims and various motions
- Observed trials, hearings, sentencings, and oral arguments and met regularly with Judge Lipman and law clerks to discuss legal issues and reasonings

Language Education

Middlebury School in China: Hangzhou, Hangzhou, China **August – December 2018**

- 16-week study abroad program in fully immersed language environment
- Completed intensive language and culture classes, and lived with Chinese roommates

Middlebury Language School: Chinese, Middlebury, VT **June – August 2018**

- Completed Chinese level 2.5 at 8-week immersive language program

Language and Interests

Language Skills: Mandarin (Conversational Proficiency – Reading, Writing, Speaking, Listening)
Interests: Historical fiction novels, hiking, Formula One racing, Dalmatians

Print Date: 06/11/2023
Page: 1 of 8
Student: Elizabeth Underwood

WASHINGTON AND LEE UNIVERSITY
Lexington, Virginia 24450-2116

SSN: XXX-XX-2472 **Entry Date:** 08/30/2021
Date of Birth: 01/25/XXXX **Academic Level:** Law

2021-2022 Law Fall
08/30/2021 - 12/18/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 109	CIVIL PROCEDURE	B+	4.00	4.00	13.32	
LAW 140	CONTRACTS	B+	4.00	4.00	13.32	
LAW 163	LEGAL RESEARCH	B+	0.50	0.50	1.67	
LAW 165	LEGAL WRITING I	B+	2.00	2.00	6.66	
LAW 190	TORTS	A-	4.00	4.00	14.68	
	Term GPA: 3.423	**Totals:**	14.50	14.50	49.65	
	Cumulative GPA: 3.423	**Totals:**	14.50	14.50	49.65	

2021-2022 Law Spring
01/10/2022 - 04/29/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 130	CONSTITUTIONAL LAW	B	4.00	4.00	12.00	
LAW 150	CRIMINAL LAW	B+	3.00	3.00	9.99	
LAW 163	LEGAL RESEARCH	A-	0.50	0.50	1.84	
LAW 166	LEGAL WRITING II	B+	2.00	2.00	6.66	
LAW 179	PROPERTY	A	4.00	4.00	16.00	
LAW 195	TRANSNATIONAL LAW	A-	3.00	3.00	11.01	
	Term GPA: 3.484	**Totals:**	16.50	16.50	57.50	
	Cumulative GPA: 3.456	**Totals:**	31.00	31.00	107.14	

2021-2022 Law Summer
05/22/2022 - 08/13/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 888	SUMMER INTERNSHIP	CR	1.00	1.00	0.00	
	Term GPA: 0.000	**Totals:**	1.00	1.00	0.00	
	Cumulative GPA: 3.456	**Totals:**	32.00	32.00	107.14	

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Student: Elizabeth Underwood

WASHINGTON AND LEE UNIVERSITY
Lexington, Virginia 24450-2116

2022-2023 Law Fall
08/29/2022 - 12/19/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 685	Evidence	A-	3.00	3.00	11.01	
LAW 708	Financial Literacy For Lawyers	B-	1.00	1.00	2.67	
LAW 715	Antitrust Law	A-	3.00	3.00	11.01	
LAW 854	Cross-Border Transactions Practicum	A-	3.00	3.00	11.01	
LAW 865	Negotiations and Conflict Resolution Practicum	A	2.00	2.00	8.00	
LAW 970	Journal of Civil Rights and Social Justice: 2L	CR	2.00	2.00	0.00	
	Term GPA: 3.641	**Totals:**	14.00	14.00	43.70	
	Cumulative GPA: 3.507	**Totals:**	46.00	46.00	150.84	

2022-2023 Law Spring
01/09/2023 - 04/28/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 690	Professional Responsibility	A	3.00	3.00	12.00	
LAW 701	Administrative Law	A-	3.00	3.00	11.01	
LAW 789	Family Law	A	3.00	3.00	12.00	
LAW 828	Trial Advocacy Practicum	A-	3.00	3.00	11.01	
LAW 970	Journal of Civil Rights and Social Justice: 2L	CR	2.00	2.00	0.00	
	Term GPA: 3.835	**Totals:**	14.00	14.00	46.02	
	Cumulative GPA: 3.579	**Totals:**	60.00	60.00	196.86	

2023-2024 Law Fall
08/28/2023 - 12/18/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 700	Federal Jurisdiction and Procedure		3.00	0.00	0.00	
LAW 707L	Skills Immersion: Litigation		2.00	0.00	0.00	
LAW 817	Statutory Interpretation Practicum		4.00	0.00	0.00	
LAW 920	Moot Court Board		1.00	0.00	0.00	
LAW 942	State Judicial Externship		2.00	0.00	0.00	
LAW 942FP	State Judicial Externship: Field Placement		2.00	0.00	0.00	
LAW 971	Journal of Civil Rights and Social Justice: 3L		1.00	0.00	0.00	
	Term GPA: 0.000	**Totals:**	15.00	0.00	0.00	
	Cumulative GPA: 3.579	**Totals:**	60.00	60.00	196.86	

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WASHINGTON AND LEE UNIVERSITY
Lexington, Virginia 24450-2116

Law Totals	Credit Att	Credit Earn	Cumulative GPA
Washington & Lee:	60.00	60.00	3.579
External:	0.00	0.00	
Overall:	60.00	60.00	3.579

Program: Law

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am on the faculty at Washington and Lee University School of Law, and am writing to you in very enthusiastic support of Elizabeth Underwood, a rising third year law student at W&L who is seeking a clerkship with your court. Ms. Underwood is bright, engaged, hard-working, and truly delightful to teach and work with.

Ms. Underwood was enrolled in my Spring 2023 Family Law class. At W&L we keep our class sizes small – my Family Law class had 35 students enrolled – so as faculty we tend to get to know our students well. Additionally, because Ms. Underwood participates in mock trial – which I judge – and has interests in the W&L campus community that overlap with mine, I have come to know Ms. Underwood outside the classroom as well. As I explain more fully below, I am confident that Ms. Underwood will be an asset to any court that has the pleasure of working with her in its chambers.

In terms of Ms. Underwood's excellent performance in my Family Law course (she earned one of the few A's I awarded), I note that although the students are required to take a series of exams, I also teach the course with an experiential bent. To that end, in addition to requiring significant case readings and related discussion and examinations, I require that the students engage deeply with the family law statutes of a state of their choosing. This assignment yields extensive in-class conversation and involves the submission of five short comparative memoranda across the course of the term. Finally, I require the students to prepare two lengthy memoranda regarding a negotiation problem that the students ultimately negotiate in pairs as a final project. Because I take this approach to the course, I am able to develop deeper insights into my Family Law students' strengths and weaknesses than is perhaps typical of a traditional law school classroom.

Ms. Underwood was one of the most active, incisive and hard-working participants in what was a very smart and lively class overall. She was eager to wrestle with challenging issues. Her in-class work and our out-of-class discussions demonstrated that she is an inquisitive, thorough, creative thinker, and that she is a close reader with very strong analytical skills. Ms. Underwood also performed extremely well on the statutory assignments and the complex negotiation problem I assigned. Her written work was very, very strong throughout. She made excellent use of the applicable authority, and her memoranda were cogent, creative, well-organized and thorough without sacrificing conciseness. Based on my experience with her work, I am confident that Ms. Underwood's writing and analytical skills would serve you well in your chambers.

Ms. Underwood also has excellent legal reasoning and advocacy skills. I was able to observe this when I presided over the mock trial semi-finals at W&L this past spring. In the mock trial context, Ms. Underwood was a standout. She was poised and self-assured, and her approach to the case was clear and creative. She did an excellent job engaging with me (as the court) when I pressed her with difficult questions, and she had an excellent command of the facts, rules of evidence, and substantive law that governed her case.

I am also confident that you will find Ms. Underwood to be a wonderful colleague. She and I have had the pleasure of interacting in more casual settings, including a very interesting intellectual salon-style dinner organized by one of my colleagues to grapple with some challenges W&L faces. Those discussions highlighted what a delight Ms. Underwood is to interact with - she is bright, collaborative, curious, diplomatic, and kind-hearted.

Ms. Underwood was truly a pleasure to teach and work with, and I am confident that she will bring much to your chambers. I would welcome the opportunity to talk with you regarding Ms. Underwood, and I encourage you to contact me with any questions you may have.

Very truly yours,

C. Elizabeth Belmont
Clinical Professor of Law

Elizabeth Belmont - belmontb@wlu.edu

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

A couple of months ago, I witnessed something amazing. It happened when a controversial speaker came to our campus and a number of students protested in various ways. In fact, a number of students who had protested the speaker sat in the back of the venue and simply stood up and abruptly walked out when the speaker took the podium. At least one student who had concerns about the speaker's views, however, stayed to hear him out. She listened politely while the speaker gave his presentation and then rose to her feet when it was time for questions. She asked a pointed question that exposed much of the speaker's argument as premised upon a factual assertion that was demonstrably false.

The speaker responded with a strange combination of evasion, attack, and dismissiveness, questioning why someone with her views would even be at the university and repeatedly calling the student "the lady." The student stood her ground. Notwithstanding the clear sentiment of the remaining crowd against her position – and notwithstanding the speaker's gas-lighting and thinly-disguised gender bullying--she remained unflappable, calm, and insistent upon responses to her quite-reasonable questions. After watching the event via a remote feed (I was not there in person), I reached out to the student to tell her that (1) I saw in her the makings of an excellent trial lawyer/litigator; and (2) I would be happy to write her a strong recommendation letter at any time.

This is that letter, and the student who stood up that day is Elizabeth Underwood. I understand that she is applying to you for a clerkship position. She is a first-rate candidate and I extend my most enthusiastic recommendation. Even viewed in isolation, the above-described event demonstrates that Ms. Underwood has courage, tenacity, and a razor-sharp mind. She showed poise under fire in a hostile and unsupportive environment. She also demonstrated an innate tactical persuasive ability by relentlessly boring in on a central factual flaw that undergirded the speaker's argument. She showed persistence when the speaker (and his allies) resorted to diversionary tactics and ad hominems instead of joining issue on the point she raised. I was (and remain) so proud of her and so proud that our law school helped produce such a student.
But there is far more to Ms. Underwood than just this one event. Last semester, I also judged a round of a negotiation competition where she was among the final competitors. I was very impressed by how deftly she dealt with a complex factual and legal situation, while at the same time exhibiting social intelligence of the highest order. She did a superb job. Her advocacy abilities were recently recognized by her peers here at the school when she was named Vice Chair of our Moot Court Executive Board.

As a professor here at Washington and Lee, I have also have had the privilege of having Ms. Underwood as a student in class (Antitrust). Ms. Underwood was always highly prepared and enthusiastic. As a student, she was always well-prepared to answer questions, asked excellent questions herself, wrote lucidly, and delivered on exams. She quickly and impressively developed mastery of a difficult area of the law which combines the complexities of economics, litigation strategy, government enforcement, and interpretation of an expansive statute that rivals some of the more expansive provisions in the Constitution.

In sum, Ms. Underwood hits all the high points on characteristics that would make a fantastic clerk—integrity, courage, diligence, brilliance, ability to absorb new material quickly, excellent writing and oral communication skills, social intelligence, a sense of justice, and dedication. She would be fantastic as a clerk. If you have any questions, please do not hesitate to contact me.

Sincerely,

David Eggert
Professor of Practice

David Eggert - eggertd@wlu.edu - 540-458-8335

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to highly recommend Ms. Elizabeth Underwood to serve as a clerk in your Honorable Court. During the summer of 2022, Ms. Underwood served as Judicial Intern for the U.S. District for the Western District of Tennessee where she conducted legal research, drafted memorandums and orders on pro se prison claims and motions. Ms. Underwood is scheduled to serve as an intern during the 2023-2024 academic year for the Montgomery County, Virginia Circuit Court.

Ms. Underwood was enrolled in my Trial Advocacy Practicum during the spring 2023 semester. Ms. Underwood excelled both in the classroom and during her mock trial exercises. Elizabeth was always prepared, went to great lengths to perfect her presentations, and worked well with her classmates as well as her trial team.

Ms. Underwood attended Washington and Lee University as an undergraduate student where she obtained a B.A. in Strategic Communication and a B.A. in East Asian Languages and Literature with an emphasis on Chinese. She was a Critical Language Scholarship Finalist for Chinese and obtained a Certificate of International Immersion. Outside of the classroom, Ms. Underwood served as an academic peer tutor, Ring-Tum Phi staff writer, a soprano member of the University Singers and University Singers Public Relations Chair. She completed an intensive sixteen week study abroad program at Middlebury School in Hangzhou, China.

Upon completing her undergraduate studies, Ms. Underwood completed a business fundamentals course through Harvard Business School Online.

During her time with Washington and Lee School of Law, Ms. Underwood has served as Vice-Chair of the W&L Law Moot Court Board and Lead Articles Editor for the Journal of Civil Rights and Social Justice. She was a runner-up on the mock trial competition, a Robert J. Grey, Jr. Negotiations Competition top finalist and a Semifinalist in the John W. Davis Appellate Advocacy Competition.

In summary, Ms. Underwood is an excellent, well-rounded student with strong interpersonal and analytical skills. I highly recommend her for a position as a judicial clerk in your Honorable Court. Please give her application every favorable consideration.

If you need any additional information, please do not hesitate to contact me at hammondl@wlu.edu or 540-969-9793.

Sincerely,
/s/
Lethia C. Hammond
Professor of Practice

WRITING SAMPLE

The following writing sample is an excerpt from my student journal note for the *Journal of Civil Rights and Social Justice*. In this note, I argue that the Global Magnitsky Act provides a unique opportunity to prevent further human rights abuses against the Uyghur population and other ethnic and religious minority groups in Xinjiang, China. I suggest that targeted sanctions and visa restrictions against those responsible for the abuses, applied simultaneously by countries with domestic versions of the Act through a treaty, can effectively prevent further human rights abuses and demonstrate a commitment to international collaboration in protecting human rights. My analysis examines different domestic and international legal mechanisms aimed at addressing human rights crises and concludes that a treaty among nations with domestic Global Magnitsky Acts provides the international community with a critical means for invoking real change in Xinjiang.

A New Era of Accountability: The Global Magnitsky Act's Potential to Address Human Rights Violations in Xinjiang

Elizabeth Underwood

I. Reports of Human Rights Violations Against the Uyghur Population in Xinjiang, China

Recent reports have shed light on the human rights abuses committed against the Uyghur population and other Muslim groups in Xinjiang, China. These reports indicate that the Chinese government has detained over one million individuals in facilities, including "political education" camps, pretrial detention centers, and prisons.[1] The Chinese government's consistent justification for these detentions is its concern about "potential unrest."[2]

Most significantly, the Office of the U.N. High Commissioner for Human Rights ("OHCHR") released a report on August 31, 2022, which firmly established that the Chinese government has committed serious human rights violations in Xinjiang.[3] The report highlights that these violations occur within the Chinese government's application of "counter-terrorism and counter-'extremism' strategies."[4] For the first time, the OHCHR report recognizes that the crimes against the Uyghurs may be officially characterized as "crimes against humanity" and that the

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1 *See Break Their Lineage, Break their Roots: China's Crimes Against Humanity Targeting Uyghurs and other Turkic Muslims*, HUMAN RTS. WATCH (Apr. 19, 2021) (indicating that human rights abuses against Muslim minority groups are not a new phenomenon and have escalated in recent years) [perma.cc/6DMB-8RQF].

2 *See* Amy K. Lehr & Mariefaye Bechrakis, *Combatting Human Rights Abuses in Xinjiang*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Dec. 16, 2020) (confirming that multilateral sanctions are far more effective than unilateral sanctions) [perma.cc/PB28-79NM].

3 *See OCHCR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, OFFICE OF THE UNITED STATES HIGH COMM'R FOR HUMAN RTS. (AUG. 31, 2022) (finding the Chinese government has committed serious human rights violations during its application of alleged counter-terrorism and counter-extremism strategies) [perma.cc/HT2T-HEQ2].

4 *See id.*

> The implementation of these strategies, and associated policies in XUAR has led to interlocking patterns of severe and undue restrictions on a wide range of human rights. These patterns of restrictions are characterized by a discriminatory component, as the underlying acts often directly or indirectly affect Uyghur and other predominantly Muslim communities.

United Nations ("U.N.") officially acknowledges and stands in opposition to the human rights abuses committed against the Uyghurs.[5]

The Chinese government's treatment of the Uyghur population and other Muslim groups has been widely reported by human rights organizations and various news media outlets.[6] The Chinese government has reportedly committed human rights violations, including imposing harsh prison sentences upon members of Muslim groups without due process.[7] Furthermore, officials have been forcing individuals within these minority Muslim groups to undergo mandatory sterilization and birth control in an attempt to lower the birth rates among the minority population.[8] Individuals who are detained or imprisoned in Xinjiang are often subjected to torture, forced labor, and cultural and political indoctrination.[9] Forced labor is a key part of the Chinese government's efforts to "re-educate"[10] Muslim minorities in Xinjiang, as they believe that imposing forced labor

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5 *See China: New UN Report Alleges Crimes Against Humanity*, HUMAN RTS. WATCH (Aug. 31, 2022, 8:30 PM) (noting that victims and their families can now turn to the U.N. and its member states to hold the abusers accountable in Xinjiang) [perma.cc/EJ4J-C85G].

6 *See Break Their Lineage, Break their Roots*, *supra* note 1 (acknowledging that research from Stanford Law School's Human Rights & Conflict Resolution Clinic and Human Rights Watch, along with reports by human rights organizations, the news media, and activist groups shows that the Chinese government has previously and is currently committing crimes against humanity against Muslim minority groups).

7 *See Break Their Lineage, Break their Roots*, *supra* note 1 (providing examples of when the Chinese government has imposed harsh prison sentences without due process for relatively insignificant actions).

8 *See* Adrian Zenz, *Sterilizations, IUDs, and Coercive Birth Prevention: The CCP's Campaign to Suppress Uyghur Birth Rates in Xinjiang*, 20 THE JAMESTOWN FOUNDATION 12 (July 15, 2020, 12:53 PM) ("In 2019, a growing number of witnesses testified to the fact that Xinjiang authorities were administering known drugs and injections to women in detention, forcibly implanting intrauterine contraceptive devices (IUDs) prior to internment, coercing women to accept surgical sterilization, and using internment as punishment for birth control violations.") [perma.cc/HL2E-JUVM].

9 *See Break Their Lineage, Break their Roots*, *supra* note 1 (observing that while prisoners and detainees experience abuse within the detention facilities, the oppression, including mass surveillance and control, also continues outside of those facilities).

10 *See* Jen Kirby, *China just legalized "reeducation" camps for Uighur Muslims*, VOX (Oct. 10, 2018, 2:40 PM) ("Uighurs and other Muslim minorities in the region are being detained in mass numbers and forced to undergo psychological indoctrination — like studying communist propaganda and giving thanks to Chinese President Xi Jinping.") [perma.cc/LT8U-TMPM].

will encourage loyalty towards the Chinese Communist Party by breaking Muslim Minorities' cultural and religious ties.[11]

In addition to the abuses committed within prisons and detention facilities, China has been conducting invasive surveillance of the Uyghur population in Xinjiang under the guise of national security interests.[12] Investigations have determined that the surveillance technology has transformed Xinjiang into a "segregated surveillance" zone with security personnel compelling ethnic minorities to submit to monitoring and data collection.[13] However, Chinese entities and individuals are not the only groups to have benefitted from using forced labor within the surveillance zones in Xinjiang. Reports indicate that at least 82 well-known global brands in the technology, apparel, and automotive industries have individuals from within the Uyghur population working in forced labor in their supply chains.[14] This includes companies such as Apple, BMW, Gap, Huawei, Nike, Samsung, Sony, and Volkswagen.[15]

Overall, the reports of human rights abuses committed against the Uyghur population and other Muslim groups in Xinjiang are a matter of serious concern. These reports highlight the need for the international community to address the human rights abuses and hold those responsible accountable for their actions.

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11 *See* Lehr & Bechrakis, *supra* note 2 (highlighting forced labor as a key aspect of oppression which "includes long hours of Chinese language instruction and political indoctrination in detention facilities and even in factories, far from family members and friends...labor in factories will make these groups more like the Han Chinese...which in turn will increase their loyalty to the CCP and counteract the risk of terrorism.").

12 *See* Chris Buckley & Paul Mozur, *How China Uses High-Tech Surveillance to Subdue Minorities*, THE N.Y. TIMES (May 22, 2019) (demonstrating how China uses state-run companies and technology to conduct mass surveillance and thus promote authoritarianism) [perma.cc/SMS6-QQYR]; *see also* Ross Smith, *Corporate Violations of Human Rights: Addressing the Coordinated Surveillance and Persecution of the Uyghur People by the Chinese State and Chinese Corporations*, 49 GA. J. INT'L. & COMP. L. 641, 644 (2021) (examining how the Chinese government conducts "segregated surveillance" of the Uyghurs and other Muslim minority groups in Xinjiang).

13 *See* Buckley & Mozur, *supra* note 12 (depicting the mass "segregated surveillance" in Xinjiang as a "virtual cage" that helps complement the indoctrination camps).

14 *See* Vicky Xiuzhong Xu, et al. *Uyghurs for sale*, AUSTRALIAN STRATEGIC POL'Y INST. (Mar. 1, 2020) (examining United States corporate human rights failings in China) [perma.cc/55V6-UJZN].

15 *See id.* (identifying major global brands that use materials and products made by Uyghur workers employed under forced labor conditions in China).

II. Overview of the Magnitsky Act

President Barack Obama signed the original Magnitsky Act, formally known as the Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012, into law on December 14, 2012.[16] The Magnitsky Act was enacted following the death of a Russian lawyer named Sergei Magnitsky, whom Russian authorities arrested and imprisoned after he accused Russian law enforcement officials of stealing his clients' funds and fraudulently obtaining a $230 million tax refund.[17] While imprisoned, prison officers beat Sergei to death and refused to provide him medical attention.[18]

Due to the success and bipartisan support of the 2012 Magnitsky Act,[19] President Obama signed into law an expanded version of the 2012 Magnitsky Act titled the Global Magnitsky Act in 2016,[20] which pushed beyond merely punishing individuals in Russia directly involved with Sergei's death.[21] This iteration of the Magnitsky Act broadened the president's ability to sanction corrupt foreign government officials.[22] More specifically, it authorized the United States government to block or revoke the visas and freeze all United States property interests of *any*

16 Pub. L. No. 112-208 (Dec. 14, 2012).

17 *See* Michael Casey, Cori Lable, & Martin De Luca, *U.S. Expands Efforts to Target Corrupt Foreign Officials*, 31 No. 12 WESTLAW JOURNAL WHITE-COLLAR CRIME 2, 3 (2017) (explaining the reasoning and purpose behind the original version of the United States Magnitsky Act).

18 *See id.* (sharing Sergei Magnitsky's story and how it led to the original Magnitsky Act which held the liable the individuals responsible for Sergei's detention and death); *see also* Bill Browder, *Red Notice: A True Story of High Finance, Murder, & One Man's Fight for Justice*, 240 (2015) (providing an in-depth account of how the Magnitsky Act came into existence).

19 *See* The US Global Magnitsky Act: Questions and Answers, HUMAN RTS. WATCH, (Sept. 13, 2017, 10:40 AM) (acknowledging how both Republicans and Democrats helped support and sponsor the Magnitsky Act) [perma.cc/HVS4-F436].

20 *See* Adam Gomes-Abreu, *Are Human Rights Violations Finally Bad for Business? The Impact of Magnitsky Sanctions on Policing Human Rights Violations*, 20 J. INT'L BUS. & L 173, 179 (2022) (showing how the immediate success of the original Magnitsky Act led to the Global Magnitsky Act, which expanded its jurisdiction).

21 *See* Jhanisse Vaca Daza, *Magnitsky Rule of Law Accountability Act: Success and Impact*, 6 J. Glob. Rts. & Orgs. 30, 37 (2016) (indicating the intent of the original Magnitsky Act was to expose individuals involved with the Magnitsky Case by enforcing a ban from entering the United States and freezing their related assets).

22 *See* Casey et al, *supra* note 17 ("Expanding on the principles behind the Russia-focused act, the Global Magnitsky Act authorizes the president to impose sanctions -- including travel bans and asset freezes -- on any foreign government official responsible for "significant corruption.")

individual who has engaged in serious human rights abuses or corruption.[23] In essence, the Global Magnitsky Act granted the Executive Branch with the ability to apply sanctions against any individual in the world engaging in human rights violations and government corruption.[24] The implementation of the Global Magnitsky Act eventually led the European Union,[25] the United Kingdom,[26] Canada,[27] and additional countries to adopt their own versions of the Global Magnitsky Act.

III. United Nations and United Nations-Sponsored Treaties

International tribunals have historically been used to provide justice for victims of human rights abuses;[28] however, the International Court of Justice (ICJ) is limited in its ability to provide restitution to victims and prevent the Chinese government from committing human rights violations in Xinjiang. The ICJ is the principal judicial body of the U.N.[29] Most notably, the ICJ a court of international law that has jurisdiction over legal disputes between States submitted to the

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23 *See generally* Global Magnitsky Human Rights Accountability Act, Pub. L. No. 114-328, §§ 1261-65.

24 *See* Gomes-Abreu, *supra* note 20, at 180–81 (acknowledging how the Global Magnitsky Act is widely regarded as a "powerful weapon in the executive branch's arsenal" because the president can "unilaterally freeze the assets of allegedly corrupt actors worldwide").

25 *See* Council of the European Union, *EU adopts a global human rights sanctions regime*, COUNCIL OF THE EUROPEAN UNION AND THE EUROPEAN COUNCIL (Dec. 7, 2020, 1:00 PM) (noting the European Union's decision to approve a Magnitsky-style agreement to address international human rights abuses and violations by state and non-state actors) [perma.cc/GYV3-R4SQ].

26 *See* Nicola Newson, *Magnitsky Sanctions*, HOUSE OF LORDS LIBRARY (June 18, 2021) (discussing how the United Kingdom's Sanctions and Anti-Money Laundering Act 2018 created a domestic legal framework to impose Magnitsky-style sanctions) [perma.cc/YC2U-3A68].

27 *See* Brent Bambury, *Canada is Getting Its Own Magnitsky Act and Vladimir Putin is Not Impressed*, CBC (Oct. 6, 2017, 5:18 PM) (reporting that Canada's version of the Magnitsky Act "Justice for Victims of Corrupt Foreign Officials Act" passed in 2017 to hold accountable corrupt officials who violate internationally recognized human rights) [perma.cc/6HYZ-GCJU].

28 *See* Jennifer M. Green, *Corporate Torts: International Human Rights and Superior Officers*, 17 Chi. J. Int'l L. 447, 456 (2017) (noting special international tribunals created to address mass atrocities in the former Yugoslavia and Rwanda to provide restitution, compensation, and rehabilitation for victims of convicted human rights violators).

29 *See The Court*, INT'L CT. OF JUST. (last visited Jan. 9, 2023) (describing the basic format and foundation of the court in The Hague) [perma.cc/9BP2-D8G2].

court by the States, in which the court may produce binding rulings.[30] The ICJ may also entertain requests for advisory opinions on legal questions referred to it by U.N. organs and specialized agencies.[31] Under Article 36 of the Statute of the International Court of Justice, the ICJ has jurisdiction over cases involving the interpretation or application of international treaties and conventions, questions of international law, and other legal issues that may arise in the context of the U.N. or other international organizations.[32]

Although the ICJ might theoretically seem like a viable alternative to imposing sanctions on China, using the ICJ to punish human rights abusers in this case is impractical. It is unlikely that the ICJ would be used in cases involving human rights abuses against the Uyghur population in China, especially considering individuals may not bring a claim to the ICJ.[33] Moreover, under Articles 36(1)[34] and 36(2),[35] the ICJ has jurisdiction based on the consent of the parties to the dispute, and states and international organizations are not required to bring their disputes to the ICJ.[36] Overall, however, it would be unlikely that China would recognize ICJ jurisdiction under Article 36(2) if a nation filed a suit against China for its activities in Xinjiang.[37]

While the ICJ could issue an advisory opinion relating to the human rights violations in Xinjiang, the advisory opinions are not binding and thus are ineffective in requiring and promoting

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30 *See How the Court Works*, INT'L CT. OF JUST. (2017) (stating that the judgment issued is final, binding on the parties, and without appeal) [perma.cc/PL49-K9TF].

31 *See id.* (considering the ICJ's two main duties as a judicial body: to settle legal disputes between States and answer requests for advisory opinions).

32 Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993.

33 *See How the Court Works*, *supra* note 29 (stating that the court is limited in that it may specifically handle legal disputes between States submitted to it by them).

34 Statute of the International Court of Justice, *supra* note 32, at art. 36(1).

35 *See id.* at 36(2).

36 *See How the Court Works*, *supra* note 29 (stating that states must consent, under one of the required avenues, for their legal disputes to fall within the jurisdiction of the ICJ).

37 Statute of the International Court of Justice art. 26, *supra* note 32; *see* Preston Jordan Lim, *Applying International Law Solutions to the Xinjiang Crisis*, 22 ASIAN-PACIFIC L. & POL'Y J. 90, 133–34 (2020) (acknowledging China's reservations to provisions involving jurisdiction in other human rights treaties).

actual change.[38] Under Article 65 of the ICJ Statute, the Court can provide advisory opinions on legal questions to an authorized body under the Charter of the U.N.[39] Article 96 of the U.N. Charter authorizes the General Assembly, Security Council, or other specific U.N. agencies to request an advisory opinion.[40] As previously mentioned, it is unlikely that U.N. Security Council would decide to request an advisory opinion due to China's veto power.[41] However, the General Assembly and other organs authorized by the General Assembly may still request an advisory opinion.[42] Despite the inherent limitations with using the ICJ to explore remedies for abuse victims, using the U.N. General Assembly or a U.N. council to request an advisory opinion could be a useful tool in expressing international condemnation and potentially convincing China and participating entities to change their actions.[43] Importantly, requesting an ICJ advisory opinion would demonstrate to the international community and resolve doubt that China has committed human rights abuses in violation of international law.

The U.N. Convention on the Prevent and Punishment of the Crime of Genocide ("Genocide Convention") is an international treaty that defines genocide as

> Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[44]

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38 *See How the Court Works*, *supra* note 29 (considering how the advisory opinions are not binding on a party since the requesting organ, agency, or organization may give effect to the advisory opinion as it sees fit).

39 Statute of the International Court of Justice, *supra* note 30, at art. 65.

40 U.N. Charter art. 96.

41 U.N. Charter art. 23, ¶ 1; art. 27, ¶ 1.

42 *See* Lim, *supra* note 37, at 134 (finding that using the General Assembly to request an advisory opinion could effectively circumvent China's veto power within the Security Council).

43 *See id.* at 139 (arguing that an assembly request for an ICJ advisory opinion would be legally viable and desirable).

44 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9 1948, S. Exec. Doc.

Under the Genocide Convention, China's actions against the Uyghur population and other Muslim minority groups in Xinjiang may violate Articles II(b) and II(d).[45] Article II(b) provides that one of five genocidal acts is fulfilled when a government has caused "serious bodily or mental harm to members of the group."[46] To clarify, the Preparatory Committee of the ICC added that serious bodily or mental harm to one or more persons "may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment."[47] Scholars and human rights organizations have established that Chinese government authorities in Xinjiang have subjected individuals within concentration camp systems to inhumane treatment involving torture.[48] However, the difficulty would arise in proving the intent aspect to properly fulfill the complete definition of genocide.[49] Further, it is highly unlikely that an international tribunal would be willing to label China's actions against the Uyghurs in Xinjiang as a genocide, especially considering the high standards required in other previous cases at international tribunals.[50]

Chinese officials in Xinjiang have arguably violated Article II(d) of the Genocide Convention; however, it would prove challenging to hold these officials accountable under this legal framework due to the complex nature of proving genocidal intent. Article II(d) of the

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45 *See* Lim, *supra* note 37, at 97–100 (arguing that China violated at least two out of the five listed genocidal acts).

46 Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, art. II(b), 102 Stat. 3045, 3034 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951); *see* Lim, *supra* note 37, at 98 (asserting findings that serious bodily or mental harm does not necessarily need to be "permanent and irremediable").

47 Rep. of the Preparatory Comm'n for the Int'l Crim. Ct., U.N. Doc. PCNICC/2000/1/Add.2 (2001).

48 *See* Lim, *supra* note 37, at 98 (providing one survivor account from Xinjiang in which she was shocked with a stun gun to the head for spending more than the allowed time in the restroom); *see generally The Chinese Communist Party's Human Rights Abuses in Xinjiang*, U.S. DEP'T OF STATE [perma.cc/AXE7-VQ62].

49 *See* Lim, *supra* note 37, at 97 (determining that genocidal intent refers to the intent to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such").

50 *See id.* at 100

> International tribunals in the past have set a very high bar for a finding of genocidal intent. For example, in *Croatia v. Serbia* (2015), the [ICJ] held that Croatia had to establish the "existence of a pattern of conduct from which the only reasonable conclusion to be drawn is an intent of the Serb authorities to destroy that substantial part of the group." Similarly, the ICJ held in *Bosnia and Herzegovina v. Serbia and Montenegro* (2007) that … "for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent."

Genocide Convention recognizes that a government "imposing measures intended to prevent births within the group" constitutes an act of genocide.[51] Importantly, it has been determined that Article II(d) is not a particularly difficult clause to satisfy because it must only be proven that measures were imposed to prevent births, not that the imposed measures actually succeeded.[52] However, it would be unlikely for the Chinese government's actions to be labeled as "genocide" and thus provide an avenue for accountability under Article II(d) due to the high burden that in factually proving genocidal intent.[53] Some scholars maintain that China could defend their acts involving forced sterilization as an imposition of birth control policies to control Uyghur population growth, rather than an effort to eliminate the Uyghur population "in whole or in part."[54]

In addition to criminalizing China's actions under Article II(b) and Article II(d) of the Genocide Convention, some scholars have even narrowed in on Article II(c), maintaining that Article II(c) should be revived to protect the Uyghur population under Article II(c)'s intrinsic health protections.[55] Article II(c) prohibits "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."[56] Reports and witness testimonies consistently find that Chinese officials have deprived health access to individuals within the internment camps.[57] Additionally, these sources have uncovered "instances of

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51 Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, art. II(d), 102 Stat. 3045, 3034 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951).

52 *See* Lim, *supra* note 37, at 99 (clarifying genocidal intent to only require that the acts were undertaken with "substantial knowledge and certainty that prevention of births will proximately occur").

53 *See id.* at 97, 100–02 (providing various examples from international court cases and tribunals involving narrow definitions of genocidal intent).

54 *See id.* at 101–02 (hypothesizing that while the prosecution could point to the magnitude of the decrease in Uyghur population figures to rebut China's defense, genocidal intent would still be difficult to clearly show).

55 *See* Adi Radhakrishnan, *An Inherent Right to Health: Reviving Article II(c) of the Genocide Convention*, 52 COLUM. HUMAN RTS. L. REV. 80, 83 (2020) (observing how many today only apply the term genocide to cases of mass murder that are "characterized by overt targeting and persecution of a protected group").

56 Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, art. II(c), 102 Stat. 3045, 3034 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951).

57 *See* Radhakrishnan, *supra* note 55, at 132 (pointing to researchers who have identified that members of the Uyghur population have suffered health disparities compared to the majority Han ethnic population).

waterboarding, electrocution, repeated beatings, torture by stress and submission positions, and injections of unknown substances," among other forms of torture.[58] However, Article II(c) has also been viewed as unable or insufficient to properly define and prevent genocidal conduct on its own due to its narrow definition of genocide in omitting the elements of what conduct would constitute a violation of Article II(c).[59] As a result, statutory limitations and restraints, such as narrowed definitions and high standards of intent, make the Genocide Convention difficult to apply and use to protect the victims in Xinjiang.

A. Other International Human Rights Treaties

Human rights abuse victims in Xinjiang are also limited in their abilities to seek remedies and hold the Chinese government accountable for human rights violations under various international human rights treaties. China is a state party to certain human rights treaties, including human rights treaties within the U.N., in which the Chinese government has an obligation to respect, protect, and fulfill the rights set out in these treaties.[60]

While China signed the International Covenant on Civil and Political Rights ("ICCPR") in 1998, China has not formally ratified it.[61] The ICCPR is a human rights treaty that was adopted by the U.N. in 1966.[62] It provides that countries bound to the treaty have an obligation to respect and ensure a variety of civil and political rights for individuals, including the right to life, freedom of

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58 *See id.* at 132–33 (arguing that these repeated orders demonstrate an intent to "break their lineage, break their roots, break their connections, and break up their origins").

59 *See id.* at 105, 139 (warning that consistent failures to characterize actual genocides as legal genocides will likely make the primary goals and concepts of the Genocide Convention insignificant).

60 See *UN Human Rights Treaty Bodies*, U.N. SUSTAINABLE DEVELOPMENT GROUP (stating that states assume and are expected to fulfill particular obligations and duties under international human rights law once they become parties to international treaties) [perma.cc/Y23H-7Z9H].

61 See *China: Ratify Key International Human Rights Treaty*, HUM. RTS. WATCH (Oct. 8, 2013, 3:59 PM) (recognizing that despite China's repeated promises to join the ICCPR, it still remains the only country among the permanent members of the U.N. Security Council to have not joined) [perma.cc/Q5MQ-CW7K].

62 *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

expression, and freedom of religion.[63] The ICCPR requires State parties to respect and ensure equal rights to the individuals within the State "without distinction of any kind."[64] As a party that has signed but not yet ratified the ICCPR, China must, at a minimum, adhere to an obligation "to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty."[65] Some have argued that if China had ratified the ICCPR, its actions in Xinjiang, particularly the scope of its surveillance mechanisms, would be in violation of China's obligations under the treaty itself, despite national security claims.[66] However, many contend that China should "unsign" the treaty altogether because of the decline of civil and political rights inside China along with the Chinese Government's efforts to "dilute human rights norms outside its borders."[67]

Nonetheless, China has ratified the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), which prohibits torture and other cruel, inhuman or degrading treatment or punishment and requires states parties to take steps to prevent such abuses.[68] Under the CAT, the Chinese government has an obligation to take steps to prevent torture and other cruel, inhuman, or degrading treatment or punishment, to hold abusers accountable for committing the abuses, and to cooperate with relevant international bodies to

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63 *See id.*

64 *See id.* at art. 2, 1; s*ee also* Smith, *supra* note 12, at 668 (observing that the ICCPR prohibits parties who claim to be acting "in time of public emergency" to discriminate against individuals merely because of certain statuses such as religion).

65 *See* Vienna Convention on the Law of Treaties, art. 10, 18, May 23, 1969, 1155 U.N.T.S. 331 ("Where the signature is subject to ratification, acceptance or approval, the signature does not establish the consent to be bound. However, it is a means of authentication and expresses the willingness of the signatory state to continue the treaty-making process.").

66 *See* Smith, *supra* note 12, at 668 (arguing that China's national security justifications would not serve as a proper defense due to how Chinese corporations detain Uyghur Muslims based on religious imagery and messages on their personal social network accounts).

67 *See* Margaret K. Lewis, *Why China Should Unsign the International Covenant on Civil and Political Rights*, 53 VAND. J. TRANSNAT'L L. 131, 136–37 (2020) (acknowledging that there is no bar to China resigning and ratifying the ICCPR in the future if it changes its current course and pivots in a "rights-protecting direction").

68 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987.

prevent such abuses.[69] Although the Chinese government has publicly maintained that its actions in Xinjiang are necessary to combat terrorism and extremism, Article II of the CAT says that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, international political instability or any other public emergency, may be invoked as a justification of torture.[70] However, despite pleas for the U.N. Committee Against Torture to review China's actions and China's failure to timely file a 2019 human rights report, the CAT has failed to effectively enforce the Chinese government to comply with its standards and requirements.[71]

69 *See id.* at art. 2, 1 (stating obligations and duties that state parties to the CAT are expected to fulfill).

70 *See id.* at art. 2; *see also* Lim, *supra* note 37, at 120 (concluding that the Chinese government has committed torture under the definitions of different international rules, including the CAT and the Rome Statute).

71 *See* Rep. Christopher H. Smith & Sen. Jeff Merkley, *Commissioners Urge A UN Committee on Torture Review of China*, Congressional-Executive Commission on China (Apr. 21, 2022) (urging the U.N. Committee on Torture Review to investigate China for failing to submit its human rights country report in a timely manner) [perma.cc/PTQ6-4FHR].

Applicant Details

First Name	**Audrey**
Middle Initial	**E**
Last Name	**Van Winkle**
Citizenship Status	**U. S. Citizen**
Email Address	**audreyvanwinkle@gmail.com**
Address	**Address** Street **309 South Main Street, Apartment 8** City **Lexington** State/Territory **Virginia** Zip **24450** Country **United States**
Contact Phone Number	**5712363932**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2020**
JD/LLB From	**Washington and Lee University School of Law** **http://www.law.wlu.edu**
Date of JD/LLB	**May 10, 2024**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Washington and Lee Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Trammell, Alan
atrammell@wlu.edu
Pollard, Randle
rpollard@wlu.edu
Weiss, Allison
aweiss@wlu.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

309 S. Main Street
Lexington, VA 24450

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, V 23510-1915

Dear Judge Walker:

I am a rising third-year law student at Washington and Lee University School of Law and member of the *Washington and Lee Law Review*. I am writing to express my interest in a 2024–2025 term clerkship in your chambers.

Enclosed please find my resume, law school transcript, and writing sample. Also enclosed are letters of recommendation from Professors Alan Trammell, Randle Pollard, and Allison Weiss.

I would appreciate an opportunity to interview with you and look forward to hearing from you. Thank you for your time and consideration.

Respectfully,

Audrey Van Winkle

Audrey Van Winkle

Vanwinkle.a24@law.wlu.edu | 571-236-3932 | 309 S. Main Street, Lexington, VA

EDUCATION

Washington and Lee University School of Law, *Lexington, VA*
Candidate for J.D., May 2024
GPA: 3.678, Top 15%
Activities: *Washington and Lee Law Review*, Lead Articles Editor
Clinic & Practicum: Black Lung Clinic (2023–24 academic year); Start-Up Business Practicum (2022–23 academic year)

University of Virginia, *Charlottesville, VA*
Bachelor of Arts: Economics and History, May 2020

Lund Universitet, *Lund, Sweden,* Spring 2019

WORK EXPERIENCE

Legal Aid Justice Center **May 2023 – August 2023**
Summer Law Clerk, Economic Justice Unit

Legal Services of Northern Virginia **June 2022 – August 2022**
Summer Law Clerk

- Worked closely with supervising attorney to launch an eviction expungement clinic pilot program; held 7 weekly clinics serving 30 clients and expunging 56 eviction cases; designed materials and best practices for the clinic.
- Assisted in Low-Income Tax Clinic by meeting with clients, taking affidavits, conducting legal research, and drafting Response to Summary Judgment for U.S. Tax Court.
- Drafted petitions, motions, and bills of particulars for guardianship, unlawful ouster, and warrant in debt cases.
- Attended courthouse outreach services and court proceedings in housing and pro se dockets weekly.

President's Commission on the University in the Age of Segregation **June 2019 – March 2020**
Intern

- Conducted archival research, document digitization and professional transcription of historical documents related to the history of the University of Virginia, 1865 to 1980.

City of Charlottesville **June 2018 – August 2018**
Lifeguard

Dunn Loring Swim Club
Front Desk Worker **May 2021 – August 2021**
Lifeguard & August Manager **June 2013 – August 2017**

- Assisted in scheduling and payroll for a staff of 50 lifeguards; 5-time recipient of "Guard of the Week."

VOLUNTEER EXPERIENCE

Blue Ridge Legal Services, ***Volunteer*** **October 2021 – Spring 2022**

- Answered phones and screened clients to start the client intake process.

Virginia Department of Health Medical Reserve Corp, ***Volunteer*** **March 2021 – May 2021**

- Worked as a non-medical volunteer at health department COVID-19 vaccination sites.

Madison House Volunteer Organization, ***Volunteer*** **November 2017 – March 2020**

- Head coach for local youth basketball and youth soccer organizations leading weekly practices and games.
- Volunteered at a community garden which provided fresh produce to low-income community members.

Print Date: 06/01/2023
Page: 1 of 2
Student: Audrey Elizabeth Van Winkle

WASHINGTON AND LEE UNIVERSITY
Lexington, Virginia 24450-2116

SSN: XXX-XX-2000 **Entry Date:** 08/30/2021
Date of Birth: 11/24/XXXX **Academic Level:** Law

2021-2022 Law Fall
08/30/2021 - 12/18/2021

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 109	CIVIL PROCEDURE	B+	4.00	4.00	13.32	
LAW 140	CONTRACTS	B+	4.00	4.00	13.32	
LAW 163	LEGAL RESEARCH	B	0.50	0.50	1.50	
LAW 165	LEGAL WRITING I	A-	2.00	2.00	7.34	
LAW 190	TORTS	A	4.00	4.00	16.00	
	Term GPA: 3.550	**Totals:**	14.50	14.50	51.48	
	Cumulative GPA: 3.550	**Totals:**	14.50	14.50	51.48	

2021-2022 Law Spring
01/10/2022 - 04/29/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 130	CONSTITUTIONAL LAW	B+	4.00	4.00	13.32	
LAW 150	CRIMINAL LAW	B+	3.00	3.00	9.99	
LAW 163	LEGAL RESEARCH	B	0.50	0.50	1.50	
LAW 166	LEGAL WRITING II	A-	2.00	2.00	7.34	
LAW 179	PROPERTY	A-	4.00	4.00	14.68	
LAW 195	TRANSNATIONAL LAW	A	3.00	3.00	12.00	
	Term GPA: 3.565	**Totals:**	16.50	16.50	58.83	
	Cumulative GPA: 3.558	**Totals:**	31.00	31.00	110.31	

2022-2023 Law Fall
08/29/2022 - 12/19/2022

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 685	Evidence	A	3.00	3.00	12.00	
LAW 716	Business Associations	A	4.00	4.00	16.00	
LAW 793	Federal Income Tax of Individuals	A-	3.00	3.00	11.01	
LAW 827	Start-Up Business Practicum	A-	2.00	2.00	7.34	
LAW 911	Law Review: 2L	CR	2.00	2.00	0.00	
	Term GPA: 3.862	**Totals:**	14.00	14.00	46.35	
	Cumulative GPA: 3.643	**Totals:**	45.00	45.00	156.66	

Print Date: 06/01/2023
Page: 2 of 2
Student: Audrey Elizabeth Van Winkle

WASHINGTON AND LEE UNIVERSITY
Lexington, Virginia 24450-2116

2022-2023 Law Spring
01/09/2023 - 04/28/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 690	Professional Responsibility	A-	3.00	3.00	11.01	
LAW 701	Administrative Law	A	3.00	3.00	12.00	
LAW 787	Estate and Gift Taxation	A	2.00	2.00	8.00	
LAW 821	Non-Profit Tax Planning & Representation Practicum	A-	3.00	3.00	11.01	
LAW 827	Start-Up Business Practicum	A-	3.00	3.00	11.01	
LAW 911	Law Review: 2L	CR	2.00	2.00	0.00	
	Term GPA: 3.787	**Totals:**	16.00	16.00	53.03	
	Cumulative GPA: 3.678	**Totals:**	61.00	61.00	209.69	

2023-2024 Law Fall
08/28/2023 - 12/18/2023

Course	Course Title	Grade	Credit Att	Credit Earn	Grade Pts	Repeat
LAW 700	Federal Jurisdiction and Procedure		3.00	0.00	0.00	
LAW 707B	Skills Immersion: Business		2.00	0.00	0.00	
LAW 725	Conflict of Laws		3.00	0.00	0.00	
LAW 817	Statutory Interpretation Practicum		4.00	0.00	0.00	
LAW 931	Adv Administrative Litigation Clinic (Black Lung)		5.00	0.00	0.00	
	Term GPA: 0.000	**Totals:**	17.00	0.00	0.00	
	Cumulative GPA: 3.678	**Totals:**	61.00	61.00	209.69	

Law Totals	Credit Att	Credit Earn	Cumulative GPA
Washington & Lee:	61.00	61.00	3.678
External:	0.00	0.00	
Overall:	61.00	61.00	3.678

Program: Law

End of Official Transcript

WASHINGTON AND LEE UNIVERSITY TRANSCRIPT KEY

Founded in 1749 as Augusta Academy, the University has been named, successively, Liberty Hall (1776), Liberty Hall Academy (1782), Washington Academy (1796), Washington College (1813), and The Washington and Lee University (1871). W&L has enjoyed continual accreditation by or membership in the following since the indicated year: The Commission on Colleges of the Southern Association of Colleges and Schools (1895); the Association of American Law Schools (1920); the American Bar Association Council on Legal Education (1923); the Association to Advance Collegiate Schools of Business (1927); the American Chemical Society (1941); the Accrediting Council for Education in Journalism and Mass Communications (1948), and Teacher Education Accreditation Council (2012).

The **basic unit of credit** for the College, the Williams School of Commerce, Economics and Politics, and the School of Law is equivalent to a semester hour.
The **undergraduate calendar** consists of three terms. From 1970-2009: 12 weeks, 12 weeks, and 6 weeks of instructional time, plus exams, from September to June. From 2009 to present: 12 weeks, 12 weeks, and 4 weeks, September to May.
The **law school calendar** consists of two 14-week semesters beginning in August and ending in May.

Official transcripts, printed on blue and white safety paper and bearing the University seal and the University Registrar's signature, are sent directly to individuals, schools or organizations upon the written request of the student or alumnus/a. Those issued directly to the individual involved are stamped "Issued to Student" in red ink. ***In accordance with The Family Educational Rights and Privacy Act of 1974, as amended, the information in this transcript is released on the condition that you permit no third-party access to it without the written consent from the individual whose record it is. If you cannot comply, please return this record.***

Undergraduate

Degrees awarded: Bachelor of Arts in the College (BA); Bachelor of Arts in the Williams School of Commerce, Economics and Politics (BAC); Bachelor of Science (BS); Bachelor of Science with Special Attainments in Commence (BSC); and Bachelor of Science with Special Attainments in Chemistry (BCH).

Grade	Points	Description
A+	4.00	4.33 prior to Fall 2009
A	4.00	Superior.
A-	3.67	
B+	3.33	
B	3.00	Good.
B-	2.67	
C+	2.33	
C	2.00	Fair.
C-	1.67	
D+	1.33	
D	1.00	Marginal.
D-	0.67	
E	0.00	Conditional failure. Assigned when the student's class average is passing and the final examination grade is F. Equivalent to F in all calculations
F	0.00	Unconditional failure.

Grades not used in calculations:

I	-	Incomplete. Work of the course not completed or final examination deferred for causes beyond the reasonable control of the student.
P	-	Pass. Completion of course taken Pass/Fail with grade of D- or higher.
S, U	-	Satisfactory/Unsatisfactory.
WIP	-	Work-in-Progress.
W, WP, WF	-	Withdrew, Withdrew Passing, Withdrew Failing. Indicate the student's work up to the time the course was dropped or the student withdrew.

Grade prefixes:

R Indicates an undergraduate course subsequently repeated at W&L (e.g. RC-).

E Indicates removal of conditional failure (e.g. ED = D). The grade is used in term and cumulative calculations as defined above.

Ungraded credit:

Advanced Placement: includes Advanced Placement Program, International Baccalaureate and departmental advanced standing credits.

Transfer Credit: credit taken elsewhere while not a W&L student or during approved study off campus.

Cumulative Adjustments:

Partial degree credit: Through 2003, students with two or more entrance units in a language received reduced degree credit when enrolled in elementary sequences of that language.

Dean's List: Full-time students with a fall or winter term GPA of at least 3.400 *and* a cumulative GPA of at least 2.000 *and* no individual grade below C (2.0). Prior to Fall 1995, the term GPA standard was 3.000.

Honor Roll: Full-time students with a fall or winter term GPA of 3.750. Prior to Fall 1995, the term GPA standard was 3.500.

University Scholars: This special academic program (1985-2012) consisted of one required special seminar each in the humanities, natural sciences and social sciences; and a thesis. All courses and thesis work contributed fully to degree requirements.

Law

Degrees awarded: Juris Doctor (JD) and Master of Laws (LLM)

Numerical Grade*	Letter Grade**	Points	Description
4.0	A	4.00	
	A-	3.67	
3.5		3.50	
	B+	3.33	
3.0	B	3.00	
	B-	2.67	
2.5		2.50	
	C+	2.33	
2.0	C	2.00	
	C-	1.67	
1.5		1.50	This grade eliminated after Class of 1990.
	D+	1.33	
1.0	D	1.00	A grade of D or higher in each required course is necessary for graduation.
	D-	0.67	Receipt of D- or F in a required course mandates repeating the course.
0.5		0.50	This grade eliminated after the Class of 1990.
0.0	F	0.00	Receipt of D- or F in a required course mandates repeating the course.

Grades not used in calculations:

-	WIP	-	Work-in-progress. Two-semester course.
I	I	-	Incomplete.
CR	CR	-	Credit-only activity.
P	P	-	Pass. Completion of graded course taken Pass/Not Passing with grade of 2.0 or C or higher. Completion of Pass/Not Passing course or Honors/Pass/Not Passing course with passing grade.
-	H	-	Honors. Top 20% in Honors/Pass/Not Passing courses.
F	-	-	Fail. Given for grade below 2.0 in graded course taken Pass/Fail.
-	NP	-	Not Passing. Given for grade below C in graded course taken Pass/Not Passing. Given for non-passing grade in Pass/Not Passing course or Honors/Pass/Not Passing course.

* Numerical grades given in all courses until Spring 1997 and given in upperclass courses for the Classes of 1998 and 1999 during the 1997-98 academic year.
** Letter grades given to the Class of 2000 beginning Fall 1997 and for all courses beginning Fall 1998.

Cumulative Adjustments:

Law transfer credits - Student's grade-point average is adjusted to reflect prior work at another institution after completing the first year of study at W&L.

Course Numbering Update: Effective Fall 2022, the Law course numbering scheme went from 100-400 level to 500-800 level.

Office of the University Registrar
Washington and Lee University
Lexington, Virginia 24450-2116
phone: 540.458.8455
email: registrar@wlu.edu

University Registrar

220707

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I understand that Audrey Van Winkle has applied for a clerkship in your chambers, and I write to offer her my enthusiastic recommendation.

Audrey and I first became acquainted during the summer of 2022 when she asked me to supervise her Law Review Note on the plight of indigent tenants facing eviction proceedings. Since that initial meeting, I have always been struck by Audrey's clear-eyed understanding of the ways that legal systems often fail the most vulnerable members of society and her desire to bring about meaningful change in her community.

Audrey's Note focuses on Virginia's appeal bond waiver, which normally allows indigent defendants to appeal cases from General District Court to Circuit Court. Specifically, she critiques a statutory exemption to the appeal bond waiver that, in essence, prevents indigent tenants from appealing an eviction order. Her Note carefully explores the statutory framework, the labyrinthine system that indigent tenants must navigate (usually without the assistance of counsel), and the systematic injustices that often result. Her work displays deep knowledge of a complex network of statutes, courts, and predictable power dynamics. Even more impressively, though, Audrey's writing demonstrates careful and thoughtful analysis of both the broader problem facing indigent tenants as well as the nuanced mechanics of how the entire system works. She interrogates legislative assumptions and creatively explores a range of potential legislative and judicial responses—from surgical interventions to bolder attempts to give vulnerable people greater access to justice.

As Audrey's supervisor, I hope that I offered constructive advice during the Note-writing process, but I can attest to how much I learned from her along the way. As a scholar of federal courts and federal civil procedure, I remain acutely aware that we teach first-year students an idealized version of how civil litigation should work. A number of colleagues who write in this space rightly challenge us to equip our students with a more complete picture of how civil litigation actually plays out—particularly in the courts where poor and pro se litigants often find themselves. To my mind, engaging with these questions about meaningful access to justice ranks among the most important work that lawyers can do to improve their neighbors' lives and communities. I remain grateful to Audrey for helping educate me about an area that I had not explored in depth and that I am excited to discuss in future classes.

In short, I have immense respect for Audrey's intellectual, writing, and analytical abilities, and I have every confidence that she will make an outstanding clerk. I would be remiss if I did not add that she is a true delight to have as a student, and I look forward to having her in my Federal Jurisdiction and Procedure class in the fall. She is a careful listener and has an easygoing, engaging demeanor. From all that I have observed, Audrey enjoys enormous respect among her peers at the law school. This unique combination of intellect and empathy ideally equips her to become the type of lawyer who will effect genuine social change.

I could not recommend Audrey to you more highly, and I hope that you will not hesitate to contact me if I can tell you anything else that would helpful.

Sincerely,

Alan M. Trammell
Associate Professor of Law

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I enthusiastically write a letter of recommendation to support Ms. Audrey Van Winkle's application for a federal judicial clerkship. I had the pleasure of having Ms. Van Winkle as a student in my Federal Income Taxation of Individuals class and my Non-Profit Tax Planning & Representation practicum at Washington and Lee University School of Law. In both the class and the practicum, she demonstrated the critical thinking and general curiosity necessary to decipher complex tax law concepts. Her fellow students benefited from her insights and her well thought-out questions. She was an exceptional student and she received one of the highest grades in both of my classes. I consider her, without hesitation, one of my best students.

I give my highest recommendation for Ms. Van Winkle to receive a federal judicial clerkship. She will be a tremendous asset to your chambers.

Please feel free to contact me if you need additional information.

Sincerely,

Randle B. Pollard
Professor of Practice

Randle Pollard - rpollard@wlu.edu

WASHINGTON AND LEE UNIVERSITY
SCHOOL OF LAW
LEXINGTON, VA 24450

June 05, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to write a letter of recommendation on behalf of Audrey Van Winkle. I taught Audrey legal writing during the 2021-2022 school year at Washington and Lee School of Law. Legal writing is a small class of about 20 students. It requires students to actively engage: every class, students must write individually or in groups and analyze and discuss various components of legal analysis. As a result, I got to know Audrey well over the course of the year. Audrey developed into a very skilled legal writer and thinker. As a result, I think she would make a wonderful addition to chambers.

Audrey did very well in my class. In the fall semester she received an A-, a grade reserved only for the very top of the class. There are two main assignments in the fall, both objective memoranda. On both assignments she received one of the highest grades in the class. Her memos were clear, well-reasoned and thorough.

In the spring, the course transitioned to persuasive writing and here, Audrey also excelled. For both the trial court memorandum and appellate brief, Audrey was able to find the relevant cases, persuasively analyze them, and draft clear and precise prose. If there was any part of the class that Audrey struggled with, it was the oral argument requirement. She was very nervous but worked hard to overcome her fear of public speaking. Audrey and I talked about strategies for effective oral advocacy even in spite of her nerves. Audrey extensively prepared for oral arguments with a determined attitude and effectively argued for her client.

Finally, Audrey is pleasant and friendly. She is easy to get along with, diligent, and agreeable. I think Audrey would be an extremely capable clerk. I highly recommend her.

Sincerely,

Allison Weiss
Professor of Practice

Allison Weiss - aweiss@wlu.edu

Audrey Van Winkle

Vanwinkle.a24@law.wlu.edu | 571-236-3932 | 309 S. Main Street, Lexington, VA

Writing Sample

The attached writing sample is an excerpt of my Law Review Student Note: *Courts of Last Resort? How Virginia Statute Prevents Indigent Tenants from Accessing Appellate Review.* I received limited editorial feedback from the Law Review's Executive Editors which I incorporated into this piece.

The Note explores the validity of excluding tenants from accessing the indigent appeal bond waiver of Section 16.1-107 under both the Virginia and Federal Constitutions; examines the barrier the appeal bond poses to fair and equal access to the court system; and proposes legislative, state and federal judicial solutions that would allow indigent tenants equitable access to Circuit Court and appellate review.

I have excerpted Part II, which focus on civil appellate rights both federally and in Virginia, and Part III, which focuses on the right to a jury trial in civil cases both federally and in Virginia. I am happy to provide a full copy of my Note upon request.

II. THE RIGHT TO APPEAL

The Supreme Court has repeatedly disclaimed the existence of constitutional protections for civil appeals.[87] The Supreme Court has been able to disclaim the existence of a constitutional right to appeal because each state has its own civil appellate protections in place via statute or state constitution.[88] Virginia was the last state to do so in 2022 when it created the right to appeal to the Virginia Court of Appeals.[89]

A. *The Right to Appeal: Due Process and Equal Protection Protections*

Although no Federal constitutional right to appeal exists,[90] the Supreme Court has extended Due Process and Equal Protection Clause protections to indigent appellants' ability to access appellate review in certain contexts.

Limited Due Process and Equal Protection Clause protections exist for indigent litigants seeking to proceed in forma pauperis—seeking to proceed without paying costs.[91] The ability of an indigent litigant "to proceed in forma pauperis is grounded in a common law

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87 *See* Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 31 n.4 (1987) (Stevens, J., concurring) (disclaiming constitutional protection for civil appeals); Griffin v. Illinois, 351 U.S. 12, 18 (1956) ("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."); Cobbledick v. United States, 309 U.S. 323, 325 (1940) ("[T]he right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice . . . ."). *But see* Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1233 (2013) (observing that because "most jurisdictions granted a statutory right of appeal . . . statements [disclaiming appellate constitutional protections are] almost always dicta.").

88 Robertson, *supra* note 87, at 1234.

89 *See* VA. CODE ANN. § 17.1-405 ("Any aggrieved party may appeal to the Court of Appeals from . . . any final decision of a circuit court.").

90 *But see* Robertson, *supra* note 87, at 1241–45 (arguing that procedural due process protections should be extended to appellate review via application of the Mathews test).

91 *See infra* footnotes 92–101 and accompanying text.

right of access to the courts and constitutional principles of due process."[92] Despite cases from the Warren Court that suggest that discrimination on the basis of wealth (or lack thereof) would be suspect under the Equal Protection Clause,[93] jurisprudence since *San Antonio Independent School District v. Rodriguez*[94] asserts that the poor are neither a quasi-suspect nor suspect class under the Equal Protection Clause of the Fourteenth Amendment.[95]

Due Process protections exist in a limited manner for indigent litigants on the basis of fundamental rights. The Court examined due process in the context of access to courts in *Boddie v. Connecticut*.[96] The central holding being that in cases involving indigent litigants: "Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[97] In a *Boddie* concurrence, Justice Brennan recognized a "constitutional right of poor people to access civil

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92 C.S. v. W.O., 230 Cal. App. 4th 23, 30 (2d Dist. 2014).

93 *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 668 (1966) (invalidating a poll tax on the basis that using wealth or affluence as a qualification to vote was impermissible discrimination); Douglas v. People of State of Cal., 372 U.S. 353, 355 (1963) ("[T]here can be no equal justice where the kind of an appeal a man enjoys depends on the amount of money he has." (internal citations omitted)); Griffin v. Illinois, 351 U.S. 12, 17 (1956) ("a State can no more discriminate on account of poverty than on account of religion, race, or color.").

94 411 U.S. 1 (1973) (upholding a Texas state financing scheme that funded education in wealthier districts at the expense of poorer school districts).

95 *See* Harris v. McRae, 448 U.S. 297, 323 (1980) ("[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification."(citations omitted)). *But see* Henry Rose, *The Poor As A Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407, 419–21 (2010) (positing both that the poor likely meet factors required to be considered a suspect class and that the Supreme Court has never actually applied these factors to the question of the poor as a suspect class).

96 401 U.S. 371 (1971).

97 *Id.* at 377.

courts to vindicate their legal rights."[98] Yet, *Boddie* did not establish an independent fundamental right to access court without paying fees. Instead, the decision rested upon the underlying case implicating fundamental rights related to the dissolution of marriage.[99]

Supreme Court decisions requiring litigants proceeding in forma pauperis access to appellate review rest on fundamental rights analysis. If the indigent appellant's interest is not fundamental, a state may require the payment of court fees and costs by indigent litigants.[100] Thus, courts apply rational basis scrutiny to most due process claims involving appellate review and indigent tenants.

Applying a rational basis to due process and equal protection claims, the Supreme Court has recognized some procedural protections for indigent tenants once access to appellate review is afforded by state statute or state constitution.[101] For example, while

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98 Henry Rose, *Why Do the Poor Not Have a Constitutional Right to File Civil Claims in Court Under Their First Amendment Right to Petition the Government for a Redress of Grievances?*, 44 SEATTLE U. L. REV. 757, 763 (2021); *see also Boddie*, 401 U.S. at 387–88 (Brennan, J., concurring in part)("It is an unjustifiable denial of a hearing, and therefore a denial of due process, to close the courts to an indigent on the ground of nonpayment of a fee. . . . The right to be heard in some way at some time extends to all proceedings entertained by courts.").

99 *See Boddie*, 401 U.S. at 382–83 (emphasizing the opinion of the court applied only to indigent persons seeking divorce).

100 *See* Ortwein v. Schwab, 410 U.S. 656, 660 (1973) (per curiam) (upholding $25 filing fee for civil appeals required for an indigent litigant to appeal the reduction of his welfare benefits did not violate due process or equal protection clauses of the Fourteenth Amendment); Bernstein v. State of N. Y., 466 F. Supp. 435, 438 (S.D.N.Y.), *aff'd sub nom.* Bernstein v. State, 614 F.2d 1285, (2d Cir. 1979) (upholding a $10 fee for filing notice of appeal for review of a verdict reached after *a full trial before a jury* as not violative of an indigent appellant's Fourteenth Amendment rights).

101 *See* Griffin v. Illinois, 351 U.S. 12 (1956) (holding that that an Illinois law that required indigent criminal appellants to purchase a trial transcript to access appellate review violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment); *see also* Lindsey v. Normet, 405 U.S. 56, 78 (1972) ("When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause.").

eviction appeal bonds generally do not violate the Equal Protection and Due Process clauses of the Fourteenth Amendment, the Supreme Court struck down an Oregon statute requiring a double-bond for eviction cases on Fourteenth Amendment grounds because it found the heightened appeal bond requirement to be arbitrary and irrationally discriminatory, in other words, lacking a rational basis, against the tenant appellants.[102] While the right to appellate review is not an essential requirement of due process, a state that provides a means of appeal may not put limitations on it that are discriminatory or arbitrary.[103] Appeal bonds do not violate due process so long as the bond is reasonable and not excessive.[104] A 1983 challenge to Virginia's old appeal bond statute requiring a bond for "rent which has accrued and may accrue but not to exceed one year's rent" was found not to violate the Equal Protection Clause by the Fourth Circuit.[105] The Court's reasoning suggested that the limit of a year's rent placed on the Virginia appeal bond was reasonably related to the valid state objectives of "guarding

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102 *See Lindsey*, 405 U.S. at 78 (1972)

> The discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious. For them, as a practical matter, appeal is foreclosed, no matter how meritorious their case may be. The nonindigent FED appellant also is confronted by a substantial barrier to appeal faced by no other civil litigant in Oregon. The discrimination against the class of FED appellants is arbitrary and irrational, and the double-bond requirement of ORS s 105.160 violates the Equal Protection Clause.

103 16D C.J.S. Constitutional Law § 1997.

104 *Lindsey*, 405 U.S. at 78 (1972).

105 Letendre v. Fugate, 701 F.2d 1093, 1095 (4th Cir. 1983).

> The Virginia statutory requirement of an appeal bond for rent which has accrued and may accrue but not to exceed one year's rent is well within the language of Lindsey permitting a bond to guard a damage award already made or to insure a landlord against loss of rent if the tenant remains in possession.

a damage award already made" and "insuring a landlord against loss of rent if the tenant remains in possession."[106] Nor was the appeal bond amount discriminatory nor arbitrary.[107]

For indigent appellants, courts apply rational basis scrutiny to most Equal Protection or Due Process claims involving the right to appellate review.

B. *The Right to Appeal in Virginia*

In Virginia, absent statutory authority or constitutional mandate, no party has a right to a de novo appeal of a General District Court judgment to Circuit Court.[108] The Virginia Supreme Court instructs that the "statutory procedural prerequisites must be observed" before a de novo appeal is taken from General District Court to Circuit Court.[109] For indigent tenants, this means that an appeal bond must be posted according to statute before appealing de novo to Circuit Court as there is no statutory authority to appeal to Circuit Court in cases of unlawful detainer without first paying the appeal bond.[110] Without statutory

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106 *Letendre*, 701 F.2d at 1095 (4th Cir. 1983).

107 *Letendre*, 701 F.2d at 1095 (4th Cir. 1983).

108 *See* Robert and Bertha Robinson Fam., LLC v. Allen, 810 S.E.2d 48, 56 (Va. 2018)

> "In case after case" involving appeals from courts not of record, "we have in clear, unequivocal, and emphatic language repeatedly said that '[t]he right of appeal is statutory and the statutory procedural prerequisites must be observed.' " Covington Virginian, Inc., 182 Va. at 543, 29 S.E.2d at 409 (citation omitted)."The right of appeal is statutory," Brooks v. Epperson, 164 Va. 37, 40, 178 S.E. 787, 788 (1935), because it is "a process of civil law origin," Tyson, 116 Va. at 252, 81 S.E. at 61 (citation omitted).This history directly impacts our analysis of the issue in this case by establishing the first premise: Absent a statutory authorization or a constitutional mandate, no party has a right to a de novo appeal of the GDC's judgment in the circuit court. Customary practices, by themselves, cannot create this right.

109 *Id.*

110 *See* VA. CODE ANN. §§ 16.1-107; 8.01-129.

authorization, the right of an indigent tenant to appeal de novo without posting an appeal bond must rest upon a constitutional mandate.[111]

The Virginia Constitution holds sacred access to a jury in civil trials to citizens of the Commonwealth.[112] This constitutional mandate supports the idea that indigent tenants hold a right to a de novo appeal to Circuit Court—where a tenant can request a jury trial—without satisfying the statutory requirement of posting an appeal bond. [113] Part III of this Note explores the constitutional rights and common law access to a jury in trespass, ejectment, unlawful detainer actions, as well as actions related to the payment of rents.[114]

III. THE RIGHT TO JURY TRIAL IN CIVIL CASES

A. *Historical Origins of the American Civil Jury Trial*

The right to a jury in civil trials is enshrined in both the Federal[115] and Virginia Constitution.[116] American colonists adopted and adapted the English practice of the civil jury trial.[117] The use of jury trial in civil cases was a "familiar and well-ensconced feature of pre-1787 political life."[118] In the years preceding the American Revolution, civil juries were

111 *See infra* Part III.

112 *See* VA CONST. ART. 1, § 11 (" . . . in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred.").

113 *See infra* Part III.

114 *See infra* Part III.

115 *See* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

116 *See* VA CONST. ART. 1, § 11 (" . . . in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred.").

117 ELLEN E. SWARD, THE DECLINE OF THE CIVIL JURY 90 (2001) ("But jury practice in colonial America varied considerably among the colonies and between the various colonies and England.").

118 Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 653 (1973).

viewed as an important tool to attack English interests in Colonial America.[119] English authorities would attempt to circumvent the power of American jurors by moving controversial cases from courts of law into chancery and admiral courts.[120] Colonial legal writers and political theorists, drawing from Blackstone, were of the opinion that trial by jury was an important right of freemen.[121] Blackstone posited that the civil jury was a check on the privileged and aristocratic judges who "will have frequently an involuntary bias towards those of their own rank and dignity."[122] Colonial and early Americans advanced the idea of the civil jury for both ideological and pragmatic reasons. Civil juries were viewed as protection for local debtors;[123] a check on judges that received little formal legal training;[124] and as a way to frustrate unwise legislative or administrative actions.[125]

All thirteen original states retained civil juries via state constitution, statute, or by continuation of colonial judicial practices.[126] In 1776, the Virginia Declaration of Rights, a precursor to the Bill of Rights, enshrined the right to a jury in civil cases within the

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119 SWARD, *supra* note 117, at 90–91 ("Civil laws whose intent or effect was to generate revenue for English interests were under attack by juries that refused to enforce them.")

120 *See* SWARD, *supra* note 117, at 91 (noting that these were equitable courts where a jury was not required).

121 Wolfram, *supra* note 118, at 653–54.

122 *See* SUJA A. THOMAS, THE MISSING AMERICAN JURY 19 (2016) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 314–15, 373, 395).

123 *See* SWARD, *supra* note 117, at 91–92 (suggesting that Anti-federalists, who were more likely to be debtors, sought a civil jury to weaken debt collection within federal courts).

124 *See* SWARD, *supra* note 117, at 93 (discussing the poor legal training of colonial judges).

125 *See* SWARD, *supra* note 117, at 93 (noting the important role of revolution-era civil juries played in frustrating "oppressive British laws").

126 *See* Wolfram, *supra* note 118, at 655 ("The right to trial by jury was probably the only one universally secured by the first American state constitutions . . . ." (quoting L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY—LEGACY OF SUPPRESSION 281) (1963 reprint)).

commonwealth.[127] Every subsequent version of the Virginia Constitution has included substantially similar language.[128] In 1791, the ratification of the Seventh Amendment guaranteed a right to a civil jury in certain federal proceedings.[129]

B. *The Federal Right to Jury Trial in Civil Trials.*

The Seventh Amendment preserves the right to a jury in suits at common law. This excludes equitable and admirable remedies from the right to a civil jury.[130] The exclusion of equitable remedies from civil juries was complicated by the merger of law and equity in federal courts.[131] Despite the complications that arose from the merger of law and equity, ample direction from the Supreme Court exists on how to properly perform an analysis on the existence of a right to a jury trial in a civil case brought before federal court, or what counts as "suits in common law".[132]

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127 *See* VA. DECLARATION OF RIGHTS of 1776, art. 11. ("That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred.").

128 *See* A.E.D. Howard, 1 *Commentaries on the Constitution of Virginia* 244–45 (1974) (noting the minimal changes in article 11 of the Virginia Constitution of 1776, of 1851, of 1864, of 1870, of 1902, of 1928, and the Virginia Constitution of 1971).

129 *See* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .")

130 *See* Samuel Bray, *Equity, Law, and the Seventh Amendment*, 100 TEXAS L. REV. 487, 471 (2022) (discussing the boundaries of the Seventh Amendment).

131 *See, generally*, Eric J. Hamilton, *Federalism and The State Civil Jury Rights*, 65 STAN. L. REV. 815 (discussing the evolution of the right to a civil jury after the merger of law and equity).

132 *See, e.g.*, Wooddell v. Int'l Bhd. of Elec. Workers, Loc. 71, 502 U.S. 93, 98 (1991) (holding a union member was entitled to a jury trial on a LMRDA cause of action); Chauffeurs Loc. No. 391 v. Terry, 494 U.S. 558, 564, 573 (1990) (holding that the remedy of backpay is legal in nature and finding respondents are entitled to a jury trial); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 49 (1989)("Respondent's fraudulent conveyance action plainly seeks relief traditionally provided by law . . . the Seventh Amendment guarantees petitioners a jury trial upon request).

The general rule is that the court should consider whether a claim is analogous to one that would have been brought in law or equity in 1791, and whether the remedy sought is legal or equitable.[133] A historical inquiry is mandated by language of the Seventh Amendment.[134] The type of historical inquiry requires more than a surface level inquiry into historical materials, instead it requires federal judges have a deep familiarity with legal history to both understand and apply the anachronisms of law and equity in the common law system.[135]

C. *Non-incorporation of the Seventh Amendment.*

While the Seventh Amendment preserves the right to a jury trial in federal courts, the Supreme Court has consistently held that the Seventh Amendment is not incorporated via the Fourteenth amendment to the states.[136] The Supreme Court has not accepted the theory of "total incorporation" suggested by Justice Black in which the first eight amendments are incorporated en mass to the states via the Fourteenth amendment.[137] The Supreme Court set a new framework for determining whether a enumerated right should be incorporated to the state via the fourteenth amendment in *McDonald v. City of Chicago* which

133 Bray, *supra* note 130, at 468.

134 Bray, *supra* note 130, at 477.

135 Bray, *supra* note 130, at 487.

136 *See* Minneapolis & St. L.R. Co. v. Bombolis, 241 U.S. 211 (1916) (declining to incorporate the Seventh Amendment to the states); Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996) (same); Brady v. Southern Ry. Co., 320 U.S. 476 (1943) (same); Mountain Timber Co. v. State of Washington, 243 U.S. 219 (1917) (same); Justices v. Murray, 76 U.S. 274 (1869) (same).

137 *See* McDonald v. City of Chicago, Ill., 561 U.S. 752, 867 (2010) ("We have never accepted a "'total incorporation"' theory of the Fourteenth Amendment, whereby the Amendment is deemed to subsume the provisions of the Bill of Rights en masse.")(Stevens, J., dissenting); *see also* Suja A. Thomas*, Nonincorporation: The Bill of Rights After McDonald v. Chicago*, 88 NOTRE DAME L. REV. 159 for a discussion on changes to incorporation theory post-McDonald.

incorporated the Second Amendment to the states.[138] This framework requires a originalist analysis of whether the amendment is both "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition."[139]

Following the reasoning in *McDonald*, the Supreme Court has most recently incorporated the excessive fines clause from the Eighth Amendment to the states in *Timbs v. Indiana*.[140] In incorporating the excessive fines clause of the Eighth Amendment,[141] the Court found that the protection against excessive punitive economic sanctions secured by the Clause satisfies the originalist analysis set forth in *McDonald*.[142] In both *McDonald* and *Timbs*, the Court made historical arguments reaching back to the Magna Carta[143] and Blackstone's Commentaries on the Laws of England[144] to justify that the protections granted by the Second Amendment and the excessive fines clause are both "fundamental to our

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138 *See* McDonald, 561 U.S. at 791 (Alito, J.) ("A provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal government and the States.").

139 *Id.* at 767.

140 139 S. Ct. 682, 688–91 (2019) (incorporating the Excessive Fines Clause).

141 U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

142 *Timbs*, 139 S. Ct. at 687 (quoting McDonald, 561 U.S., at 767).

143 *See, e.g.*, *id.* at 687 ("The Excessive Fines Clause traces its venerable lineage back to at least 1215, when Magna Carta guaranteed that '[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement . . . .'" (internal citations omitted)).

144 *See, e.g.*, McDonald, 561 U.S. at 769 ("Founding-era legal commentators confirmed the importance of the right to early Americans. St. George Tucker, for example, described the right to keep and bear arms as 'the true palladium of liberty' and explained that prohibitions on the right would place liberty 'on the brink of destruction.'" (quoting 1 Blackstone's Commentaries, Editor's App. 300 (S. Tucker ed. 1803))).

scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition."[145] Following the incorporation in *Timbs*, only a handful of jury rights secured federally by the Fifth,[146] Sixth,[147] and Seventh Amendment[148] and protections against the quartering of soldiers[149] remain unincorporated to the states.[150]

Applying this same *McDonald* framework, some legal commentators believe the Seventh Amendment should be incorporated to the states via the Fourteenth Amendment.[151] After all, a civil jury fulfills both prongs of the originalist analysis. A civil jury is "fundamental to our scheme of ordered liberty." Supreme Court jurisprudence suggests that the Seventh Amendment is fundamental[152] and essential to a fair trial.[153]

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145 *Id.* at 764.

146 *See* U.S. CONST. amend. V (securing the right to indictment by a grand jury federally).

147 *See* U.S. CONST. amend. VI (securing the right to unanimous jury).

148 *See* U.S. CONST. amend. VII (securing the right to a jury in civil cases federally)

149 *See* U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.").

150 *See* Suja A. Thomas, *What Timbs Does Not Say*, GEO. WASH L. REV. ON THE DOCKET (March 7, 2019), https://www.gwlr.org/what-timbs-does-not-say/ (discounting the nonincorporation of the Third Amendment and noting the reluctance of the Court to incorporate jury rights).

151 *See* Thomas, *supra* note 150 (arguing that while the Seventh Amendment should be incorporated under *Timbs* or *McDonald*, this is unlikely to occur).

152 *See* Robert S. Peck & Erwin Chemerinsky, *The Right to Trial by Jury As A Fundamental and Substantive Right and Other Civil-Trial Constitutional Protections*, 96 OR. L. REV. 489, 557 (2018) (citing to Hodges v. Easton, 106 U.S. 408, 412 (1882); Jacob v. New York City, 315 U.S. 752, 752-53 (1942); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 338 (1979) (Rehnquist, J., dissenting) ("fundamental to our history and jurisprudence")).

153 *See* Peck & Chemerinsky, *supra* note 152, at 557 (citing to Simler v. Conner, 372 U.S. 221, 222 (1963); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537-39 (1958)).

A civil jury is also "deeply rooted in this Nation's history and tradition."[154] The right to a jury trial is believed to be devolved from the protections granted in the Magna Carta.[155] The jury was viewed by Blackstone as the "palladium" of English liberties,[156] a view shared by the framers of the Constitution.[157] American colonists embraced the civil jury and it was "as universally established in the colonies as in the mother country."[158] Civil jury right remained strong from the earliest days of the Republic through the adoption of the Fourteenth Amendment.[159] Under modern selective incorporation doctrine, the Seventh Amendment should be incorporated to the states through the Due Process clause of the Fourteenth Amendment.

Despite *McDonald* and *Timbs*, incorporation of the Seventh Amendment does not appear to be imminent—or even on the distant horizon.[160] Because the *McDonald* framework

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154 *Id.*

155 *See* Howard, *supra* note 128, 243–44 (1974) (tracing the early history of civil jury trial by jury in the English common law).

156 *Id.*

157 *See supra* Part III.A for a discussion of the important role of the jury in colonial United States.

158 Peck & Chemerinsky, *supra* note 152, at 557 (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 165 at 117 (Melville M. Bigelow ed., Little, Brown, and Co. 5th ed. 1905) (1833)).

159 *See* Peck & Chemerinsky, *supra* note 152, at 557–68

> [A]t the time the Fourteenth Amendment was ratified, the Constitutions of "[t]hirty-six out of thirty-seven states ... guaranteed the right to jury trials in all civil or common law cases." By comparison, as the Supreme Court noted in McDonald, only "22 of the 37 States in the Union had state constitutional provisions explicitly protecting the right to keep and bear arms."

160 *See* Thomas, *supra* note 150 ("[W]ill the [civil jury] rights be incorporated? It's unlikely. . . . [T]he Court itself pointed out that stare decisis might stand in the way of incorporation of the remaining rights. This signal from the Court may prevent petitions for certiorari from being filed on those issues."); *see also* Andrew Cohen & Suja Thomas, *Is There Any Way to Resuscitate the Seventh Amendment Right to Jury Trial?* BRENNAN CTR. FOR JUST. (Nov. 28, 2022),

has yet to be applied to the Seventh Amendment,[161] the current jurisprudence declines to extend the right to jury trial to claims brought in state courts.[162] The Fourth circuit has specifically held that because the Seventh Amendment has not been incorporated, the appeal bond provision requiring indigent tenants to post appeal bonds to access a circuit court, and thus a civil jury, does not violate Due Process or Equal Protection Clauses of the Fourteenth Amendment.[163] Therefore, looking to the Virginia state constitution and not federal Constitution is the appropriate approach for determining whether a right to civil jury exists for indigent tenants.[164]

D. *Virginia State Constitution Right to Jury Trial in Civil Trials*

The Virginia right to civil jury trial is more expansive facially than the federal right.[165] Yet, the Virginia jurisprudence is very similar to the federal jurisprudence.[166] The general rule is that an action must have had the right to a jury trial in 1776 when the Virginia Constitution was adopted.[167] In applying this jurisprudence, courts have noted that "the right

https://www.brennancenter.org/our-work/analysis-opinion/there-any-way-resuscitate-seventh-amendment-right-jury-trial (discussing the jurisprudence of Justices Kavanaugh, Gorsuch, and Barrett as unsympathetic toward civil jury rights to the same extent as criminal jury rights).

161 *See* Peck & Chemerinsky, *supra* note 152, at 556 (noting [lower] courts have adhered to the result dictated by nineteenth century precedent on Seventh Amendment incorporation and are awaiting a definitive ruling from the Supreme Court that the non-incorporation precedents are overruled while the Supreme Court has explicitly recognized "the Seventh Amendment's civil jury requirement jurisprudence long predate the era of selective incorporation").

162 *See* cases cited *supra* note 136.

163 *See* Letendre v. Fugate, 701 F.2d 1093 (4th Cir. 1983) (seeking a declaratory judgment that Virginia Code § 8.01–129 violated the Fourteenth Amendment).

164 *See infra* Part III.D.

165 *Compare* VA CONST. ART. 1, § 11 *with* U.S. CONST. amend. VII.

166 *See* Howard, *supra* note 128, at 244.

167 *See* REVI, LLC v. Chicago Title Ins. Co., 776 S.E.2d 808, 813 (2015)

to a civil jury provided by the state constitution is equivalent to the federal seventh amendment right."[168]

Whether an action has a right to jury depends on whether that right had been created by statute or whether the action had a common law right the jury in 1776.[169] For the guarantee of a jury trial to attach, the action should bear characteristics of "traditional common law proceedings."[170] This can be evidenced by actions for monetary damages, compensatory or punitive damages, attempts to adjust the rights and liabilities of antagonistic litigants, or requests for retrospective relief.[171] Alternatively, *Ingram v. Commonwealth*[172] suggests that a statute creating a cause of action that appears to be "a novelty of statutory law" that is in-fact based in ancient common law writs may be sufficient to establish a common law right to a jury.[173] Like in federal test, the state court should consider whether a claim is analogous to one that would have been brought in law or equity in 1776, and whether the remedy sought is legal or equitable. If the claim is analogous to a common law claim that existed in 1776, the right to jury attaches.

Article I, Section 11 of the Constitution of Virginia provides "[t]hat in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred." Yet, the right to a jury trial does not apply "to those proceedings in which there was no right to jury trial when the Constitution was adopted."

168 Boyd v. Bulala, 647 F. Supp. 781, 789 (W.D. Va. 1986).

169 Ingram v. Commonwealth, 741 S.E.2d 62, 68 (Va. Ct. App. 2013).

170 *Id.* at 68.

171 *Id.* at 68–69 (listing the traditional characteristics of common law actions).

172 *Id.*

173 *See id.* (asserting that while the code section in question had facial parallels in ancient common law writs, those parallels had little in common with the actual purpose of the code in question.)

Applicant Details

First Name	**Tatiana**
Last Name	**Varanko**
Citizenship Status	**U. S. Citizen**
Email Address	**tatiana.varanko@gmail.com**
Address	**Address** **Street** **4130 Garrett Road, Apartment 731** **City** **Durham** **State/Territory** **North Carolina** **Zip** **27707** **Country** **United States**
Contact Phone Number	**203-721-0040**

Applicant Education

BA/BS From	**George Washington University**
Date of BA/BS	**May 2018**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 12, 2024**
LLM From	**Duke University School of Law**
Date of LLM	**May 12, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Duke Journal of Comparative & International Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Buell, Sam
buell@law.duke.edu
919-613-7193

Helfer, Larry
Helfer@law.duke.edu
919-613-8573

Dunlap, Charles
dunlap@law.duke.edu
919-613-7233

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Tatiana Varanko
4130 Garrett Road
Apartment 731
Durham, NC 27707

June 12, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to express my interest in a clerkship position for the 2024-25 term or any term thereafter. I am a rising third-year law student at Duke Law School. I expect to receive my J.D. and LL.M. in International and Comparative Law in May of 2024 and will be available to clerk any time after that date.

Through my experiences before and during law school, I gained the legal research, writing, communication, and time management skills necessary to be an effective clerk. Before law school, I served as the Program Specialist for the Federal Judicial Center's International Judicial Relations Office. In this position, I worked with judges and legal professionals from the U.S. and around the world to plan and execute judicial education exchanges and technical assistance projects. I also researched, wrote, and edited content for a microsite aimed at familiarizing U.S. judges with civil and hybrid law jurisdictions. Last summer, I continued to develop my analytical skills at the Constitutional Court of Hungary.

Currently, I serve as a research assistant to Professor Laurence R. Helfer, an Article Editor for the *Duke Journal of Comparative and International Law*, and a student fellow for the Bolch Judicial Institute's *Judicature* publication. In these roles, I have conducted research, written memoranda on discrete issues, and provided editorial support. This summer, my work for Professor Helfer includes supporting his work as a member of the U.N. Human Rights Committee, reviewing State party reports. Additionally, as a teaching assistant for my school's international LL.M. writing course, I prepared the sample research memorandum for the Fall 2022 semester and taught more than 80 students how to use the Bluebook citation style.

Enclosed are copies of my resume, transcripts, writing sample, and letters of recommendation from Professor Laurence R. Helfer, Professor Samuel W. Buell, and General Charles J. Dunlap, Jr. Please contact me if you need any additional information. Thank you for your consideration.

Sincerely,
Tatiana Varanko

TATIANA VARANKO

4130 Garrett Road, Apartment 731, Durham, NC 27707
tatiana.varanko@duke.edu | (203) 721-0040

EDUCATION

Duke University School of Law, Durham, NC
Juris Doctor/Master of Laws (LLM) in International and Comparative Law expected, May 2024

GPA:	3.67
Summer Institute:	Duke-Leiden Institute in Global and Transnational Law, The Hague, Netherlands
Activities:	Duke Journal of Comparative and International Law, *Articles Editor*
	Duke Law Innocence Project, *Active Investigations Team Lead*
	Duke Afghan Asylum Project, *Student Volunteer*, Spring 2022
Academic-Year Work:	Bolch Judicial Institute/Judicature, *Student Fellow* (international rule of law)
	Professor Laurence R. Helfer, *Research Assistant* (international law & human rights)
	Professor Rima Idzelis, *Teaching Assistant* (LLM legal analysis, research & writing)

The George Washington University, Washington, DC
Bachelor of Arts in International Affairs (Concentration: Conflict Resolution), Minor in French Language, Literature & Culture, *cum laude*, May 2018

GPA:	3.55
Study Abroad:	IES Abroad, Rabat, Morocco, Spring 2017
Academic-Year Work:	National Archives and Records Administration, *Archival Aide*, 2016 –2018
	GWU Office of Alumni Relations, *Colonial Connections Caller*, 2015 –2016
	Office of Congresswoman Elizabeth Esty (D-CT), *Intern*, Fall 2015
	Peace Corps Office of Diversity and National Outreach, *Intern,* Spring 2015

EXPERIENCE

Shearman & Sterling, New York, NY
Summer Associate, May 2023 – July 2023

- Rotating through Litigation and Compensation, Governance, and ERISA practice groups.
- Working on a pro bono internal investigation related to the sexual abuse of a minor.
- Working on a pro bono project related to post-conflict justice in Ukraine.

Constitutional Court of Hungary, Budapest, Hungary
Legal Intern, Presidential Cabinet, May 2022 – June 2022

- Wrote summaries of fundamental rights cases from constitutional courts in Central Europe for a forthcoming inter-constitutional court database.
- Analyzed cases where the Hungarian Constitutional Court referenced European or international law to create a proposal for a subject-area-specific section of the inter-constitutional court database.

Federal Judicial Center, Washington, DC
Program Specialist, International Judicial Relations Office, January 2019 – August 2021

- Worked closely with IJRO Director (Mira Gur-Arie) and US judges on judicial education exchanges.
- Collaborated with US government agencies, international institutions, and partner judiciaries to implement international technical assistance projects.
- Oversaw fellowship program for foreign judges and lawyers researching areas of law or judicial practice relevant to reforms underway in their home countries and provided research support.
- Researched international rule of law and transnational litigation for web-based resources.
- Drafted all IJRO reports to the Judicial Conference and FJC Board.
- Managed ambassador and foreign representative visits for Justice Ruth Bader Ginsburg lying in repose at the Supreme Court of the United States.

Society of Industrial and Office Realtors, Washington, DC
Membership Coordinator, June 2018 – January 2019

- Provided guidance and resources to over 3,200 members across 36 countries.
- Drafted Member News and Chapter News content for the association's quarterly magazine.

ADDITIONAL INFORMATION

Worked two summers as a school custodian. Enjoys Orangetheory, collecting records, and learning Arabic.

TATIANA VARANKO
4130 Garrett Road, Apartment 731, Durham, NC 27707
tatiana.varanko@duke.edu | (203) 721-0040

UNOFFICIAL TRANSCRIPT
DUKE UNIVERSITY SCHOOL OF LAW

2021 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Contracts	Haagen, P.	4.0	4.50
Civil Procedure	Miller, D.	3.4	4.50
Torts	Coleman, D.	3.3	4.50
Legal Analysis, Research, Writing	Rich, R.	*Credit Only*	0.00

2022 WINTERSESSION

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Legal and Policy Aspects of Civil-Military Relations	Dunlap, C.	*Credit Only*	0.50
Life or Death: The Decision-Making Process in a Death Penalty Case	McAuliffe, M.	*Credit Only*	0.50

2022 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
International Law	Helfer, L.	4.0	3.00
Legal Analysis, Research, Writing	Rich, R.	4.0	4.00
International Research Methods	McArthur, M.	3.6	1.00
Criminal Law	Beale, S.	3.3	4.50
Constitutional Law	Blocher, J.	3.2	4.50

2022 DUKE-LEIDEN INSTITUTE IN GLOBAL AND TRANSNATIONAL LAW

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Authority and Legitimacy in International Adjudication	Helfer, L. and Stahn, C.	3.8	2.00
Realizing Rights: Strategic Human Rights Litigation and Advocacy	Duffy, H. and Huckerby, J.	3.8	2.00
Comparative Perspectives on Criminal Justice: Central Issues and Contextual Implementation	Coleman, J. and Ölcer, P.	3.5	2.00

2022 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Corporate Crime	Buell, S.	4.00	4.00
Use of Force in International Law: Cyber, Drones, Hostage Rescues, Piracy, and More	Dunlap, C.	3.90	2.00
Comparative Law	Qiao, S.	3.80	3.00
Human Rights Advocacy	Huckerby, J.	3.70	2.00
Property Law	Foster, A.	3.60	4.00

2023 WINTERSESSION

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Deposition Practice	Farel, L.	*Credit Only*	0.50
Leadership and Communication in the Law	Gentry, P. and Gilley, E.	*Credit Only*	0.50

2023 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Business Associations	de Fontenay, E.	4.00	4.00
Investigating and Prosecuting National Security Cases	Stansbury, S.	3.90	2.00
Comparative Constitutional Design	Knight, J.	3.80	2.00
Ethics & the Law of Lawyering	Richardson, A.	3.70	2.00
Criminal Procedure: Adjudication	Dever, J.	3.60	3.00
Evidence	Stansbury, S.	3.30	3.00
Race and the Law	Jones, T.	*Credit Only*	1.00

TOTAL CREDITS: 70.50
CUMULATIVE GPA: 3.67

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Tatiana Varanko

Dear Judge Walker:

I write to recommend Tatiana Varanko for the position of law clerk in your chambers. I do so with exceedingly strong enthusiasm.

Tatiana was my student in Corporate Crime, a demanding large course in the fall of 2022. I have come to know Tatiana from her participation in the course, meetings outside of class, including to discuss career and clerkship plans, and my review of her written work.

Tatiana's grade of 4.0 in my course was truly outstanding. Her exam paper consisted of twelve pages of writing produced in an eight-hour take-home that required covering four problems with multiple legal issues. Tatiana earned a score that tied three others, out of 43 students, for the best work in the class, in an anonymous grading process. The four-credit Corporate Crime course is rigorous and advanced, routinely attracting a cohort of the sharpest and most ambitious students in the Law School. (The course materials, which are published for free download, or bound at cost, can be seen at buelloncorporatecrime.com; the students are required to read and study almost every page of the two volumes.) Substantively, the course requires students to comprehend a broad range of topics that are challenging and unfamiliar for those who are, as Tatiana was, in only the third semester of law school: federal criminal law, constitutional criminal procedure, securities regulation, corporate law, evidence, and regulation of the legal profession.

Tatiana's paper was at the top of a group that included many of Duke Law's best performers in the second- and third-year classes. In my estimation, this showing, among an ambitious collection of some of the nation's best law students, is very strong evidence of Tatiana's promise for a career as an exceptional attorney at a national level of practice.

Tatiana is a fluent and skilled writer for her stage of education and is improving in that facility all the time. She has displayed these skills in multiple settings across her work at Duke, including as a student in the legal writing program and as a major participant in our Innocence Project and our Bolch Judicial Institute. Tatiana is seeking a clerkship in large part to continue to develop her abilities to stand out on paper and orally as a future litigation attorney who has a deep and demonstrated interest in courts. Tatiana's experiences as a full-time employee at the FJC prior to law school, her work in Hungary and the Netherlands, and her exceptional devotion to a variety of extracurricular projects at Duke are proof positive of her suitability for a demanding, full-time position in federal chambers.

Tatiana is a humble person, a "first generation" lawyer who demands a great deal of herself. One can see this in all she has done to this early stage in her life, from working as a school custodian while in college, to establishing herself as an important staffer at the FJC, to becoming integral to several programs at Duke. Even as one who came to law without prior conceptions about the field's content or culture, Tatiana is forging an independent path for herself that arises naturally from her genuine interests in and commitment to justice and international affairs. In the classroom, she is a careful listener more than one who seeks to control discussion. In the office, she is at ease in presenting herself. Tatiana will continue to grow rapidly as a lawyer and person. I see a high ceiling for her, especially with more of the mentoring she has been so astute and effective in seeking out since her undergraduate days. Whoever Tatiana clerks for, I expect the experience will lead to a career-long and deeply rewarding relationship for both her and the judge.

Having spent ten years in the federal courts before teaching, as a law clerk and as a prosecutor in several districts and circuits, and having taught and mentored thousands of law students, I am confident in predicting that Tatiana Varanko would be an excellent hire for any judge with a demanding docket and chambers that highly values professionalism and collaboration. I am happy to assist you further in any way with your evaluation of her application.

Sincerely yours,

Samuel W. Buell
Bernard M. Fishman Professor of Law

Sam Buell - buell@law.duke.edu - 919-613-7193

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Tatiana Varanko

Dear Judge Walker:

I write this very enthusiastic letter of recommendation on behalf of Tatiana Varanko, a member of the Duke University Law School JD-LLM class of 2024, who has applied for a clerkship in your chambers.

I have come to know Tatiana quite well at Duke Law, both as a student in two of my courses and as one of my research assistants. Tatiana, who also serves as an Articles Editor of the Duke Journal of International and Comparative Law, is a very bright and articulate student who is deeply curious about the law and legal institutions and who writes clear and cogent prose. She is also conscientious, respectful, and a pleasure to work with.

I first met Tatiana in the Spring of 2022. As a student in Duke Law's distinctive JD-LLM program in international and comparative law, Tatiana enrolled in International Law as a required first-year course. International Law considers a broad range of issues relating to the rules that govern the relations between nation states and between governments and private parties. The key skills that the course emphasizes include understanding the relationship among the actors, norms, and institutions of the international legal system as well as detailed analyses of treaty texts, domestic statutes, the resolutions of intergovernmental organizations, and the decisions of international tribunals and domestic courts.

Tatiana made sustained, high-quality contributions to class discussions throughout the semester. She received a final grade of 4.0 in International Law, placing her in the top 10% of a class of 48 students. Tatiana's final exam answer was excellent. She correctly identified the key legal issues, effectively marshalled the facts and evidence required to analyze them and explained her reasoning in clear and cogent prose. Her answer is especially noteworthy given that she was competing against several upper-level JD and foreign LLM students, as well as her first year classmates.

Tatiana also enrolled in "Authority and Legitimacy in International Adjudication," which I co-taught in July 2022 as part of the Duke-Leiden Institute in Global and Transnational Law, which is held in The Hague in the Netherlands. This seminar analyzes and compares international courts in different areas, including economic integration, trade, human rights, and criminal law. Students review the doctrines developed by these international judicial bodies, consider the legal and political challenges that they have confronted, and the assess the extent to which they have succeeded in overcoming these challenges. Tatiana received a final grade of 3.8, tied for the third highest grade in a class of 16 students from Duke Law School and from universities in Europe and Asia.

Tatiana's excellent academic performance extends well beyond international law. She has received top grades in courses as varied as Business Associations, Corporate Crime, and Investigating and Prosecuting National Security Cases. Although Duke Law does not rank students, her cumulative GPA of 3.67 suggests that she is within the top 10% of her class.

Based on Tatiana's strong academic performance, I invited her to work for me as a research assistant. She has help me with various projects relating to the dispute settlement mechanisms created by social media companies such as Facebook and Google for challenging the removal of online content. In 2022, for example, the European Union adopted a new regulation, the Digital Services Act, that requires internet platforms to provide such mechanisms to their users. Most recently, she has assisted me in preparing for the UN Human Rights Committee's review of several reports by States parties to the International Covenant on Civil and Political Rights, a multilateral treaty to which the United States is also a party.

For each of these research assignments, Tatiana identified a comprehensive list of relevant (and often difficult to find) sources and prepared clear and concise analytical memos setting forth her findings. I have been very satisfied with her research and writing abilities and her attention to detail. I have also been impressed by her work ethic and professional and enthusiastic attitude.

Tatiana has also had an interesting professional experience relevant to a clerkship. In May and June 2022, she served as a legal intern with the Constitutional Court of Hungary. Tatiana summarized individual rights decisions from other constitutional courts in Central and Eastern Europe and analyzed cases where the Hungarian Constitutional Court referenced foreign and international law.

Larry Helfer - Helfer@law.duke.edu - 919-613-8573

In sum, based on my many interactions with Tatiana both inside and outside of the classroom, I am confident of her ability to handle the diverse responsibilities of a judicial law clerk. If there is any additional information that I can provide to convince you to hire her, please feel free to contact me at helfer@law.duke.edu or 919-613-8573.

Sincerely yours,

Laurence R. Helfer
Harry R. Chadwick, Sr. Professor of Law

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Tatiana Varanko

Dear Judge Walker:

I am writing to strongly endorse the application of Ms. Tatiana Varanko to be your law clerk. Tatiana is a student here at Duke University School of Law, and I got to know her especially well when she took my *Use of Force in International Law* class last fall.

By way of information, I am a Professor of the Practice and Director of the Center on Law, Ethics and National Security at Duke Law School. Prior to retiring from the military in June of 2010, I served as the Air Force's deputy judge advocate general with responsibility for assisting in the supervision of more than 2,550 full and part-time attorneys.

Tatiana is a wonderful student: prepared, courteous to others, and a hard worker. She is also very articulate and able to 'think on her feet.'

Tatiana wrote a superb paper for my *Use of Force* class, "Assessing the Viability of the Use of Force to Respond to Climate Rogue States and Criminal Justice Alternatives." Her writing shows her to be a skilled researcher who can analyze complex issues, and then craft a clearly expressed legal analysis. She is definitely a standout among her peers, as is evidenced by her selection as the Articles Editor of Duke's prestigious *Journal of Comparative & International Law*.

Beyond her considerable professional talents, Tatiana is a very likeable and thoughtful young lawyer-to-be. I'll bet she'll be a very popular colleague in your chambers. Importantly, everything I know about Tatiana shows her to be a person of unquestioned integrity with very strong ethical values.

I am certain that you would be extremely pleased to have Tatiana as your law clerk. I'm more than happy to discuss this with you at your convenience.

Sincerely yours,

Charles J. Dunlap, Jr.
Major General, USAF (Ret.)
Professor of the Practice of Law
Executive Director, Center on Law,
Ethics and National Security

Charles Dunlap - dunlap@law.duke.edu - 919-613-7233

TATIANA VARANKO
4130 Garrett Road, Apartment 731, Durham, NC 27707
tatiana.varanko@duke.edu | (203) 721-0040

WRITING SAMPLE

I wrote this appellate brief for my Legal Analysis, Research, and Writing course at Duke University School of Law in the spring of 2022. The assignment was to address the meaning of the phrase "foreign or international tribunal" in 28 U.S.C. § 1782. Writing for the Respondents-Appellees, I argued that the phrase does not cover private arbitration.

The cover page, table of contents, and table of authorities have been omitted for length.

STATEMENT OF THE ISSUE

28 U.S.C. § 1782 authorizes U.S. district courts to compel individuals in their jurisdiction to provide discovery for proceedings before a "foreign or international tribunal" upon request from that tribunal or interested persons. Does the phrase "foreign or international tribunal" in 28 U.S.C. § 1782(a) include private arbitration such that foreign parties can request discovery from U.S. citizens for use in private arbitral proceedings abroad?

STATEMENT OF THE CASE

Petitioner-Appellant Op Zee Verven ("O.Z.V.") is a Dutch company that manufactures and sells paint intended for exterior use on boats. ER-1. O.Z.V. has a contract with Yacht-Sea!, an English company, for the sale of this paint. ER-2. Yacht-Sea! uses it on vessels it manufactures and sells worldwide. ER-2. The contract contains a provision naming the London Court of International Arbitration, a private arbitral body, as the forum for resolving disputes arising from the contract. ER-2.

A Yacht-Sea! customer sued the company in late 2020 for losses sustained in repairing his yacht. ER-2. It had taken on water over several months while moored at the marina in California where the Respondents-Appellees Omar Ayad, Jennifer Jones, and Yi-Chin Cho work. ER-2. In mid-2021, a jury found for the customer and ordered Yacht-Sea! to pay damages. ER-2. Yacht-Sea! sought indemnification, claiming the damages were caused by paint failure. ER-2. In September 2021, Yacht-Sea! initiated private arbitral proceedings with O.Z.V. under their contract. ER-2.

On October 5, O.Z.V. filed an Application for an Order to Take Discovery in the U.S. District Court for the Central District of California. ER-1. It requested an order authorizing it to obtain testimony from the Respondents through depositions. ER-1. O.Z.V. claimed that its

request was under 28 U.S.C. § 1782 and that the London Court of Arbitration, a private arbitral body, is a "foreign or international tribunal." ER-3. The employees filed a Response on October 25, asserting that a private arbitral body does not qualify as a "foreign or international tribunal" under § 1782 and requesting that the district court reject O.Z.V.'s Application. ER-5, ER-6.

On December 6, the district court issued an Order denying O.Z.V.'s Application. ER-7. The court held that the London Court of Arbitration is not a "foreign or international tribunal" under § 1782 because it is a private commercial arbitral body. ER-8. Thus, the district court lacked the authority to grant O.Z.V.'s request. ER-8. O.Z.V. filed its Notice of Appeal on January 3, 2022. ER-9. This appeal is the subject of the proceedings before this Court. ER-9.

ARGUMENT

THE TERM "TRIBUNAL" IN 28 U.S.C. § 1782 DOES NOT ENCOMPASS PRIVATE ARBITRAL BODIES.

28 U.S.C. § 1782 allows district courts to compel individuals in its jurisdiction to provide testimony or other discovery for proceedings before a "foreign or international tribunal." 28 U.S.C. § 1782(a). Courts may provide this international judicial assistance upon receipt of a request or letter rogatory from that tribunal or a request from an interested person in the proceedings. *Id.*

The meaning of "foreign or international tribunal" in § 1782 is central to this case. The Petitioner incorrectly claims that the phrase includes private arbitration. ER-3. However, the plain language, legislative history, and policy implications show that the language only encompasses government-sanctioned bodies. This Court should hold that private arbitral bodies are not covered by § 1782 and affirm the district court's order denying O.Z.V.'s request for discovery in proceedings before the London Court of Arbitration.

Whether a private arbitral body is a "foreign or international tribunal" under § 1782 is a matter of statutory interpretation, which constitutes a question of law. *See In re Hill*, 811 F.2d 484, 485 (9th Cir. 1987). Questions of law are reviewed de novo on appeal. *Id.*

Other circuits have previously addressed this issue. The Fourth and Sixth Circuits have incorrectly held that § 1782 does extend to private arbitration. *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 216 (4th Cir. 2020); *In re Application to Obtain Discovery for Use in Foreign Proc.*, 939 F.3d 710, 714 (6th Cir. 2019). However, the Second, Fifth, and Seventh Circuits have correctly held that it does not. *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 696 (7th Cir. 2020); *In Re Guo*, 965 F.3d 96, 100 (2d Cir. 2020) (reaffirming *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 185 (2d Cir. 1999)); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).[1]

This Court should align with the latter circuits and hold that § 1782 does not apply to private arbitration. The plain language and the legislative history illustrate that the statute only applies to government-sanctioned proceedings. This interpretation is further supported by the conflict a contrary interpretation would cause with the Federal Arbitration Act and the detrimental effects it would have on the core purposes of arbitration. For these reasons, the Court should hold that § 1782 excludes private arbitration and affirm the district court's denial of O.Z.V.'s request for discovery for proceedings before the London Court of Arbitration.

[1] The only Supreme Court decision involving § 1782 does not answer whether it applies to private arbitration. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246–47 (2004) (holding that an interested person can make a request under § 1782 for proceedings before the European Commission and that those proceedings need only be "in reasonable contemplation").

A. The plain language of 28 U.S.C. § 1782 does not include arbitration.

When resolving disputes over statutory interpretation, the Court must begin by examining the ordinary meaning of the text and the statute's structure. *United States v. King*, 24 F.4th 1226, 1231 (9th Cir. 2022). If this yields an unambiguous meaning, the Court must stop its analysis and disregard any additional arguments. *Id.* Section 1782(a) permits a "foreign or international tribunal" or interested person to request discovery for proceedings but does not specifically define "foreign or international tribunal." However, a review of the ordinary meaning of the language contemporaneous to its incorporation into the statute demonstrates that private arbitral bodies are not covered by § 1782. This is further supported by the statutory scheme, which indicates that assistance under § 1782 is only available in proceedings before a government entity.

1. The ordinary meaning of the phrase "foreign or international tribunal" does not include arbitral bodies.

When a statute does not define a term, the Court should determine its ordinary meaning by examining a dictionary definition contemporaneous to when the statute was enacted. *United States v. Carona*, 660 F.3d 360, 367 (9th Cir. 2011). When "foreign or international tribunal" was added to § 1782 in 1964,[2] *Black's Law Dictionary* defined "tribunal" as "[t]he seat of a judge; the place where he administers justice. The whole body of judges who compose a jurisdiction; a judicial court; the jurisdiction which the judges exercise." *Tribunal*, *Black's Law Dictionary* (4th ed. 1951). Notably, the definitions all include either "judge" or "court," which are inherently government-linked terms. Other dictionaries are even more explicit, stating that a tribunal "implies . . . power of decision of adjudicative effectiveness. Adjudication is a

[2] Act of October 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 995, 997 (1964).

government function, the exercise of the sovereign power of the state." *Tribunal*, *Pope Legal Definitions* (1st ed. 1919). This reinforces that a tribunal was considered a government entity in 1964. Thus, the Court should interpret the language of § 1782 as excluding private entities.

However, the statute's wording is even more particular: it modifies "tribunal," specifying that it be "foreign" or "international." The doctrine of noscitur a sociis instructs that "a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams,* 553 U.S. 285, 294 (2008). Dictionaries when § 1782 was amended defined "foreign" as "[b]elonging to another nation or country; belonging or attached to another jurisdiction." *Foreign*, *Black's Law Dictionary* (4th ed. 1951). The use of "belonging" and "attached" demonstrates the link between the state and the tribunal. Taken together, "foreign tribunal" refers to a court belonging to another country, not to a private entity. This is further supported by precedent, which shows that before the language change, the Supreme Court understood "foreign tribunal" to mean a foreign court. *See Canada Malting Co. v. Patterson S.S.*, 285 U.S. 413, 423 (1932) (stating that U.S. courts can decline jurisdiction if a foreign tribunal is a more suitable venue and that a Canadian court was more suitable in the instant case).

The second modification to "tribunal" is "international." The word's ordinary meaning is "participated in by two [or] more nations." *International*, *Webster's New International Dictionary of the English Language* (3d ed. 1961). This indicates that a tribunal that is "international" derives authority from an agreement between nations. This meaning of "international tribunal" is supported by contemporaneous discussions about international tribunals in Supreme Court concurrences. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178 n.4 (1951) (Douglas, J., concurring) (referring to the International Military Tribunal at Nuremberg as an international tribunal); *Hirota v. Gen. of the Army Douglas*

MacArthur, 338 U.S. 197, 204–05 (1949) (Douglas, J., concurring) (referring to the International Military Tribunal for the Far East as an international tribunal).

The Court has a "duty to respect not only what Congress wrote but, as importantly, what it didn't write." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019). Noticeably absent from § 1782 are the modifiers "private" or "arbitral" before the word "tribunal." *See generally* § 1782. Nowhere in the plain text of the statute is there anything that can be construed to include arbitral bodies that are not government sanctioned. *Id.* The ordinary meaning of the text is unambiguous: a private arbitral body is not a "foreign or international tribunal" under § 1782.

2. The statutory context of 28 U.S.C. § 1782 reveals that a "foreign or international tribunal" is a government-sanctioned judicatory body and does not include private arbitration.

The greater statutory scheme further demonstrates that a "foreign or international tribunal" is a judicative body deriving its authority from one or more states. When an act contains the same phrase in multiple parts, the Court should construe it consistently throughout. *City of Los Angeles v. Barr*, 941 F.3d 931, 941 (9th Cir. 2019). The Act amending the language of § 1782 also adds 28 U.S.C. § 1696 and 28 U.S.C. § 1781 to the U.S. Code. §§ 4, 8–9, 78 Stat. at 995–97. Section 1696 uses the phrase "foreign or international tribunal" when discussing service of process in foreign and international proceedings. Section 1781 uses it repeatedly when outlining the rules for the transmission of letters of rogatory or requests between a tribunal in the U.S. and one abroad. Both use "foreign or international tribunal" when discussing actions that are inherently interactions between governments. *Rolls-Royce PLC*, 975 F.3d at 695. In this statutory context, the identical language in § 1782 should be understood to apply solely to government-sanctioned bodies and not extend to private arbitration. Since the meaning of the

phrase is unambiguous after a complete textual reading, the Court should end its analysis there and not pay further mind to extrinsic arguments. *See King*, 24 F.4th at 1231.

B. The legislative history illustrates that § 1782 was not intended to apply to private arbitral bodies.

The Court should only expand its analysis to include legislative history if the text of the statute is ambiguous, and the language of § 1782 clearly refers to government entities. *J.B. v. United States*, 916 F.3d 1161, 1167 (9th Cir. 2019). However, if the Court does expand its analysis beyond the text, it will discover that the legislative history further demonstrates that § 1782 excludes private arbitral bodies.

The purpose of the Act amending the language of § 1782 was "[t]o improve judicial procedures for serving documents, obtaining evidence, and providing documents in litigation with international aspects." § 1, 78 Stat. at 995. Notably, the purpose is to improve procedures *in litigation*, which is inherently court-linked. This indicates that Congress intended to provide international judicial assistance to government-sanctioned proceedings in a foreign or international forum, not private proceedings.

Before Congress amended the language of § 1782, the statute did not provide assistance to international tribunals. Hans Smit, *Assistance Rendered by the United States in Proceedings before International Tribunals*, 62 Colum. L. Rev. 1264, 1272 (1962). However, requests for assistance in treaty-based arbitral proceedings between the U.S. and Canada and from the United States-German Mixed Claims Commission in the 1930s revealed the need to expand U.S. judicial assistance beyond foreign courts. *Id.* at 1272–73. *See also* S. Rep. 88-1580, at 3784 (1964) (citing Smit with approval). Congress enacted 22 U.S.C. §§ 270–270g to allow U.S. courts to provide assistance to international tribunals. *See* 22 U.S.C. §§ 270–270g (1962), *repealed by* § 3, 78 Stat. at 995. However, U.S. assistance was still limited to international

tribunals to which the U.S. belonged and proceedings involving the U.S. or one of its citizens. *Id*. Congress found that "[t]his limitation [was] undesirable" and sought to expand assistance to all proceedings before such entities. S. Rep. 88-1580, at 3784–85.

In 1958, Congress established the Commission and Advisory Committee on International Rules of Judicial Procedure ("the Commission") to provide recommendations for improving U.S. assistance to "foreign courts and quasi-judicial agencies." Act of September 2, 1958, Pub. L. No. 85-906, §§ 1–2, 72 Stat. 1743, 1743 (1958). Congress adopted the Commission's proposals in full; this included replacing "in any judicial proceeding pending in any court in a foreign country" in § 1782 with "in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a) (1958), *amended by* § 9, 78 Stat. at 997; § 1782(a). This change was aimed at expanding the language of § 1782 to encompass the international tribunals previously covered by 22 U.S.C. §§ 270–270g and removing the limitations it had imposed. S. Rep. 88-1580, at 3785.

Congress intended for the new language to be more liberal than the previous phraseology, but not for it to be limitless. S. Rep. 88-1580, at 3785. Hans Smit, who helped draft the Commission's recommendations,[3] identified in 1962 that "an international tribunal owes both its existence and its powers to an international agreement [between states]." Smit, *supra*, at 1267. Further, the Committee included in its recommendation examples of applicable proceedings. S. Rep. 88-1580, at 3788. These included "proceedings . . . pending before investigating magistrates in foreign countries . . . administrative and quasi-judicial proceedings . . . [and proceedings] before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court." S. Rep. 88-1580, at 3788. Notably, these are all

[3] *In re Letter of Request from Crown Prosecution Serv. of United Kingdom*, 870 F.2d 686, 689 (D.C. Cir. 1989).

government-linked bodies. Private arbitration was not mentioned once. *See generally* S. Rep. 88-1580.

Nowhere in the Commission's Report or the Congressional Record is there a mention of private arbitral bodies. *See generally* 1105 Cong. Rec. 596–98, 22,857 (1964); S. Rep. 88-1580 at 3782–3794. This shows that Congress did not consider extending § 1782 to encompass such entities. If Congress had wanted to make such a large alteration to the purpose and applicability of § 1782 it would have discussed it. Since it did not, the evidence intimates that Congress did not intend for the amended § 1782 to cover private arbitration. *National Broadcasting Co., Inc.*, 165 F.3d at 189. Thus, the Court should hold that a "foreign or international tribunal" is a government-sanctioned body.

C. Enlarging the definition of "tribunal" under § 1782 to include private arbitral bodies would have undesirable policy implications.

The Court should apply the pure text meaning of a statute when the language is clear, as it is in this case. *J.B.*, 916 F.3d at 1167. However, if it must expand its analysis, it may consider public policy alongside legislative history. *Garcia v. PacifiCare of California, Inc.*, 750 F.3d 1113, 1116 (9th Cir. 2014). Doing so for § 1782 only provides further evidence that "foreign or international tribunal" should be interpreted to exclude private arbitration.

When interpreting the language of a statute, the Court should aim to avoid conflict with other federal statutes. *California ex. rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1012 (9th Cir. 2000). This means that the Court should read § 1782 to exclude private arbitration. Doing otherwise would result in U.S. courts having a different policy for providing assistance to private arbitration abroad than they do for domestic private arbitration.

The Federal Arbitration Act is the mechanism for obtaining discovery for domestic private arbitration. *See* 9 U.S.C. § 7. The judiciary's role is more limited under 9 U.S.C. § 7 than under 28 U.S.C. § 1782. *See generally id.*; 28 U.S.C. § 1782. Section 7 permits *arbitrators* to issue a summons for documents or testimony for use in proceedings. 9 U.S.C. § 7. However, they can only petition a district court to compel such discovery if most of the arbitral panel sits within the court's jurisdiction. *Id.* Additionally, by explicitly giving such permissions to arbitrators, § 7 indicates that interested parties cannot make such requests. *National Broadcasting Co., Inc.*, 165 F.3d at 187. By contrast, 28 U.S.C. § 1782 allows both a tribunal and interested persons to request discovery without imposing limitations beyond the Federal Rule of Civil Procedure. Consequently, if the Court interprets § 1782 to include private arbitral bodies, parties to foreign arbitration will be able to request what parties to domestic arbitration cannot. *See* 9 U.S.C. § 7; 28 U.S.C. § 1782. It is illogical to think that Congress intended for foreign arbitral bodies to have more access to U.S. judicial assistance than domestic ones. To maintain consistent discovery policies for private arbitration at home and abroad, the Court must interpret "foreign or international tribunal" under § 1782 as excluding private arbitral bodies.

Extending § 1782 to include private arbitration would also undermine the incentives for choosing to arbitrate rather than litigate. Parties include arbitration provisions in their contracts to make the dispute resolution process more efficient and cost-effective than litigation. Writing arbitration into a contract allows parties to decide in advance on the forum and procedures they will use. *Biedermann Int'l*, 168 F.3d at 883. However, if "parties succumb to fighting over burdensome discovery requests far from the place of arbitration . . . [it will] thwart[] private international arbitration's greatest benefits." *Id.* Extending § 1782 would cause discovery requests for private arbitration to become unduly burdensome on parties and the courts that

consider them. To avoid such problems, the Court must read "foreign or international tribunal" in § 1782 to apply only to state-sanctioned bodies.

CONCLUSION

The Court should hold that "foreign or international tribunal" under 28 U.S.C. § 1782 does not cover private arbitration. In the present case, this means that the London Court of Arbitration is not covered by § 1782. Thus, the Respondents respectfully request that the Court affirm the Order denying O.Z.V.'s request for discovery.

Date: March 21, 2022

Respectfully submitted,

By /s/ Tatiana Varanko

Attorney for Respondents-Appellees
Omar Ayad, Jennifer Jones, and
Yi-Chin Cho

Applicant Details

First Name	**Sruthi**
Last Name	**Venkatachalam**
Citizenship Status	**U. S. Citizen**
Email Address	**sruthi.venkatachalam@yale.edu**
Address	**Address** **Street** **4580 Royal Birkdale Dr** **City** **Westerville** **State/Territory** **Ohio** **Zip** **43082**
Contact Phone Number	**7409728284**

Applicant Education

BA/BS From	**Case Western Reserve University**
Date of BA/BS	**May 2020**
JD/LLB From	**Yale Law School** **https://www.nalplawschools.org/content/OrganizationalSnapshots/OrgSnapshot_225.pdf**
Date of JD/LLB	**May 31, 2023**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Yale Law and Policy Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Morris Tyler Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hathaway, Oona
oona.hathaway@yale.edu
203-436-8969

Kronman, Anthony
anthony.kronman@yale.edu
203-432-4934

Siegel, Reva
reva.siegel@yale.edu
203-432-6791

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Sruthi Venkatachalam
93 Mansfield St. Apt. 2
New Haven, CT 06511
740-972-8284
sruthi.venkatachalam@yale.edu

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
600 Granby St.
Norfolk, VA 23510

Dear Judge Walker:

I am a third-year student at Yale Law School, and I wish to apply for a clerkship in your chambers for the 2024-2025 term or any term thereafter. During the 2023-2024 year, I will be working in the Washington, D.C. office of Skadden, Arps, Slate, Meagher & Flom LLP in the National Security Practice Group.

I am keen to clerk in your court so that I can contribute my understanding of national security, FOIA, and administrative law to your work. Since the U.S. District Court for Eastern District of Virginia adjudicates a large number of cases related to these subjects, my experience would allow me to come up to speed quickly on these matters. I am excited by both the challenge and opportunity provided by working in such a fast-paced and dynamic environment. I have a particular interest in clerking for you given your prior work in public service. As a lawyer with aspirations to enter government service, I would welcome the opportunity to work with a judge whose experience aligns with my professional interests.

I have enclosed a resume, law school transcript, undergraduate transcript, writing sample, and list of recommenders. Yale Law School Professors Oona Hathaway, Anthony Kronman, and Reva Siegel will submit letters of recommendation on my behalf. I am happy to provide any additional information you might require.

Thank you for your consideration. I would welcome the opportunity to interview with you, and I look forward to hearing from you at your convenience.

Sincerely,

Sruthi Venkatachalam
Enclosures

SRUTHI VENKATACHALAM
sruthi.venkatachalam@yale.edu | 740-972-8284 | she/her/hers
127 Wall St., New Haven, CT, 06511

EDUCATION

YALE LAW SCHOOL, New Haven, CT
J.D., expected May 2023
Activities: Yale Law and Policy Review, *Executive Development Editor*
Just Security, *Student Staff Editor*
National Security Group (NSG), *VP of Scholarship*

CASE WESTERN RESERVE UNIVERSITY (CWRU), Cleveland, OH
M.A., Military Ethics, May 2020
Honors: CALI Award in International Law (Highest grade in International Law Fall 2019 at CWRU Law School)
Thesis: Torture as Mala in Se and Rapport Based Interrogations as a Superior Model

B.A., Statistics and B.A., International Studies, May 2020, *summa cum laude*
Honors: Phi Beta Kappa, Webster Godman Simon Award for Excellence in Mathematics (awarded to one BA candidate annually), Dean's High Honor List

EXPERIENCE

COKER FELLOW IN CONSTITUTIONAL LAW Fall 2022
Fellow for Professor Kronman. Instructed a group of first year students on the fundamentals of legal writing and critiqued their briefs by providing substantial feedback on interpretations of case law and effective legal advocacy. Mentored first year students by advising them on navigating law school and developed group camaraderie.

SKADDEN, ARPS, SLATE, MEAGHER, & FLOM Summer 2022
Washington DC Office Summer Associate. Drafted memoranda in support of the national security and litigation practice groups on issues relating to the Eighth and Fourteenth Amendments, consumer financial protection, and AI technology. Analyzed case law and conducted statutory analysis related to FCRA and federal preemption of New York state laws.

MEDIA FREEDOM AND INFORMATION ACCESS CLINIC Fall 2021 – Fall 2022
Student Clinician. Advocated for algorithmic accountability in the Connecticut state legislature and testified to the Connecticut Advisory Board for the U.S. Commission on Civil Rights on the intersection between algorithms and civil liberties. Litigated First Amendment issues in state and federal court for FOIA and defamation suits.

JUDGE VICTOR A. BOLDEN, U.S. DISTRICT COURT, DISTRICT OF CONNECTICUT Spring 2022
Legal Extern. Assisted chambers in the preparation of judicial orders and opinions by conducting legal research, writing legal memoranda, and drafting sections of orders for a range of civil and criminal cases on the judge's docket.

PROFESSOR REVA SIEGEL, YALE LAW SCHOOL Winter 2021 – Spring 2022
Research Assistant. Conducted extensive research and wrote memoranda on constitutional law issues relating to reason-based bans for abortions, suspect classification based on wealth in the Warren Court, and the emergence of originalism.

U.S. DEPARTMENT OF JUSTICE, PUBLIC INTEGRITY SECTION Summer 2021
Summer Intern. Researched and drafted memoranda on novel legal issues such as those arising from emerging technologies, civil procedure, evidentiary question, statutes of limitations, and the effects of recent U.S. Supreme Court developments, drafted prosecution memoranda, and drafted motions for ongoing litigation.

FEDERAL BUREAU OF INVESTIGATION May 2018 – March 2020
D.C. Headquarters Honors Intern; Cleveland Field Office Honors Intern. Provided tactical support, program management, and analytical insights for cases in FBI's Counterterrorism Division and High Value Detainee Interrogation Group.

SKILLS AND INTERESTS

Muay Thai, Brazilian Jiu Jitsu, Classical Violin, Baking, Statistical Analysis, R and R Studio, STATA, MATLAB

YALE LAW SCHOOL

Office of the Registrar

TRANSCRIPT RECORD

YALE UNIVERSITY

Date Issued: 02

Record of: Sruthi Priyal Venkatachalam Page: 1
Issued To: Sruthi Venkatachalam
Parchment Document ID: TWB2OSBK

Date Entered: Fall 2020

Degree Awarded : Juris Doctor 31-MAY-2023

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Fall 2020					
LAW	10001	Constitutional Law I Section B	4.00	CR	R. Siegel
LAW	11001	Contracts I Section A	4.00	CR	S. Carter
LAW	12001	Procedure I Section A	4.00	CR	H. Koh
LAW	14001	Criminal Law & Admin I Grp 3	4.00	CR	J. Whitman
		Term Units 16.00 Cum Units 16.00			
Spring 2021					
LAW	21024	Cyberlaw, Policy, and Politics	1.00	CR	O. Hathaway
LAW	21277	Evidence	4.00	H	S. Carter
LAW	21722	StatutoryInterpretReqState	3.00	P	W. Eskridge
LAW	30246	Policing, Law,andPolicy Clinic	3.00	H	T. Meares, T. Tyler, J. Camacho
LAW	40001	Supervised Research	1.00	H	P. Gewirtz
LAW	50100	RdgGrp:Law and Ethics Big Data	1.00	CR	J. Balkin
		Term Units 13.00 Cum Units 29.00			
Sup. Research: Just Security Writing Fellowship.					
Fall 2021					
LAW	20011	Sentencing	3.00	P	J. Gleeson
LAW	20170	Administrative Law	4.00	H	C. Jolls
LAW	20219	Business Organizations	4.00	H	J. Macey
LAW	30175	MediaFreedm&InfoAccessClinic	4.00	H	D. Schulz, M. Linhorst, D. Dinielli, S. Baron, N. Guggenberger, J. Borg, J. Balkin, S. Stich
		Term Units 15.00 Cum Units 44.00			
Spring 2022					
LAW	21068	Antitrust	4.00	H	G. Priest
Supervised Analytic Writing					
LAW	21763	International Law	4.00	H	O. Hathaway
LAW	21784	Intelligence Law	2.00	H	O. Hathaway, R. Litt
LAW	30175	MediaFreedm&InfoAccessClinic	4.00	H	D. Schulz, M. Linhorst, S. Shapiro, D. Dinielli, S. Baron, N. Guggenberger, J. Borg, J. Balkin, S. Stich
LAW	40001	Supervised Research	2.00	CR	C. Jolls
Substantial Paper					
		Term Units 16.00 Cum Units 60.00			
Fall 2022					
LAW	20366	Federal Courts	3.00	H	A. Steinman
LAW	20557	Torts and Regulation	3.00	H	D. Kysar
LAW	30212	International Arbitration	2.00	H	M. Friedman
LAW	30218	Advanced Written Advocacy	3.00	H	N. Messing
LAW	50100	RdgGrp:Repro Justice Lawyering	1.00	CR	A. Miller
		Term Units 12.00 Cum Units 72.00			

********** CONTINUED ON PAGE 2 **********

YALE LAW SCHOOL
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TRANSCRIPT RECORD

YALE UNIVERSITY
Date Issued: 02-JUN-2023

Record of: Sruthi Priyal Venkatachalam
Level: Professional: Law (JD)

SUBJ	NO.	COURSE TITLE	UNITS	GRD	INSTRUCTOR
Institution Information continued:					
Spring 2023					
LAW	21017	Property	4.00	H	T. Zhang
LAW	21217	Crim Procedure: Adjudication	3.00	P	P. Shechtman
LAW	21258	ComparativeCrimLawFairTrials	2.00	H	R. Coffey
LAW	30193	ProsecutnExtrnshp&Instruction	3.00	H	K. Stith, M. Donovan, J. Francis, H. Cherry, S. Garbarsky
		Term Units 12.00	Cum Units	84.00	

********** END OF TRANSCRIPT **********

YALE LAW SCHOOL
P.O. Box 208215
New Haven, CT 06520

EXPLANATION OF GRADING SYSTEM

Beginning September 2015 to date

HONORS	Performance in the course demonstrates superior mastery of the subject.
PASS	Successful performance in the course.
LOW **P**ASS	Performance in the course is below the level that on average is required for the award of a degree.
CREDIT	The course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses are offered only on a credit-fail basis.
FAILURE	No credit is given for the course.
CRG	Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
RC	Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
T	Ungraded transfer credit for work done at another law school.
TG	Transfer credit for work completed at another law school; counts toward graded unit requirement.
EXT	In-progress work for which an extension has been approved.
INC	Late work for which no extension has been approved.
NCR	No credit given because of late withdrawal from course or other reason noted in term comments.

Our current grading system does not allow the computation of grade point averages. Individual class rank is not computed. There is no required curve for grades in Yale Law School classes.

Classes matriculating September 1968 through September 1986 must have successfully completed 81 semester hours of credit for the J.D. (Juris Doctor) degree. Classes matriculating September 1987 through September 2004 must have successfully completed 82 credits for the J.D. degree. Classes matriculating September 2005 to date must have successfully completed 83 credits for the J.D. degree. A student must have completed 24 semester hours for the LL.M. (Master of Laws) degree and 27 semester hours for the M.S.L. (Master of Studies in Law) degree. The J.S.D. (Doctor of the Science of Law) degree is awarded upon approval of a thesis that is a substantial contribution to legal scholarship.

For Classes Matriculating 1843 through September 1950

80 through 100 = Excellent
73 through 79 = Good
65 through 72 = Satisfactory
55 through 64 = Lowest passing grade
0 through 54 = Failure

To graduate, a student must have attained a weighted grade of at least 65.

For Classes Matriculating September 1951 through September 1955

E = Excellent
G = Good
S = Satisfactory
F = Failure

To graduate, a student must have attained a weighted grade of at least Satisfactory.

For Classes Matriculating September 1956 through September 1958

A = Excellent
B = Superior
C = Satisfactory
D = Lowest passing grade
F = Failure

To graduate, a student must have attained a weighted grade of at least D.

From September 1959 through June 1968

A = Excellent
B+
B = Degrees of Superior
C+
C = Degrees of Satisfactory
C-
D = Lowest passing grade
F = Failure

To graduate a student must have attained a weighted grade of at least D.

From September 1968 through June 2015

H = Work done in this course is significantly superior to the average level of performance in the School.
P = Successful performance of the work in the course.
LP = Work done in the course is below the level of performance which on the average is required for the award of a degree.

CR = Grade which indicates that the course has been completed satisfactorily without further specification of level of performance. All first-term required courses are offered only on a credit-fail basis. Certain advanced courses offered only on a credit-fail basis.
F = No credit is given for the course.

RC = Requirement completed; indicates J.D. participation in Moot Court or Barrister's Union.
EXT = In-progress work for which an extension has been approved.
INC = Late work for which no extension has been approved.
NCR = No credit given for late withdrawal from course or for reasons noted in term comments.

CRG = Credit for work completed at another school as part of an approved joint-degree program; counts toward the graded unit requirement.
T = Ungraded transfer credit for work done at another law school.
TG = Transfer credit for work completed at another law school; counts toward graded unit requirement.
*Provisional grade.

[redacted] [redacted]
Student Name: Sruthi Priyal Venkatachalam

Case Western Reserve University
Unofficial Transcript

Degrees/Credentials Earned

Degree/Credential: Bachelor of Arts
Date Awarded: 05/17/2020
Degree Honors: summa cum laude
Plan: International Studies with Honors
Plan: Statistics

Academic Program History

Program: Arts & Sciences Undergraduate
Completed Program
International Studies (BA) Major
Statistics (BA) Major

Test Credits

Applied Toward Undeclared Undergraduate

Fall 2016

Course	Description	Attempted	Earned	Grade	Points
BIOL 114	Principles of Biology		3 00	AP	
CHEM 111	Princ Chem for Engineers		4 00	AP	
EECS 132	Intro to Programming in Java		3 00	AP	
ECON 103	Prin of Macroeconomics		3 00	AP	
ECON 102	Prin of Microeconomics		3 00	AP	
POSC 109	The U.S. Political System		3 00	AP	
MATH 121	Calc for Science & Engr I		4 00	AP	
MATH 122	Calc for Science & Engr II		4 00	AP	
MUTH 103	Theory I		3 00	AP	
PSCL 101	General Psychology I		3 00	AP	
STAT 201	Bas Stat Soc Sci & Life Sci		3 00	AP	

Course Trans GPA: 0 000 Transfer Totals: 0.00 36 00 0.000

Transfer Credits

Transfer Credit from Case Western Reserve University
Applied Toward Arts & Sciences Undergraduate

Fall 2019

Course	Description	Attempted	Earned	Grade	Points
INTL 399	INTL Colloquium		3.00	A	
PHIL 417	War and Morality		3.00	A	
LAWS 5118	International Law Research Lab		3.00	A	
LAWS 5121	Intl Criminal Law & Procedure		3.00	A	
LAWS 4101	International Law		3.00	A	

Course Trans GPA: 4 000 Transfer totals: 15.00 15.00 60.000

Transfer Credit from Case Western Reserve University
Applied Toward Arts & Sciences Undergraduate

Spring 2020

Course	Description	Attempted	Earned	Grade	Points
PHIL 436	Military Ethics and Int'l Law		3.00	A	
PHIL 501	Military Ethics MA Capstone		6.00	A	
PHIL 405	Ethics		3.00	A	

Course	Description	Attempted	Earned	Grade	Points
LAWS 5116	International Human Rights		3 00	A	
PH L 484	Ethics and Public Policy		3 00	A	

Course Trans GPA: 4.000 Transfer totals: 18 00 18 00 72 000

Beginning of Undergraduate Record

Fall 2016

Course	Description	Attempted	Earned	Grade	Points
MATH 223	**Calc for Science & Engr III**	3 00	3 00	A	12.000
MUEN 386	**Case Camerata Chamber Orch**	1 00	1 00	A	4.000
MUEN 365	**Case Chamber Music**	1 00	1 00	A	4.000
CHIN 101	**Elementary Chinese I**	4 00	4 00	A	16.000
POSC 172	**Intro to Internatl Relations**	3 00	3 00	A	12.000
ENGR 131	**Elementary Computer Prog**	3 00	3 00	A	12.000
FSSO 158	**Orchestra in Modern Culture**	4 00	4 00	A	16.000

Term Honor: Dean's High Honors

			Attempted	Earned	Averaged	Points
Term GPA:	4.000	Term Totals	19 00	19 00	19 00	76.000
Cum GPA:	4.000	Cum Totals	19 00	19 00		76.000

Spr 2017

Course	Description	Attempted	Earned	Grade	Points
HSTY 113	**Intro to Modern World Hist**	3 00	3 00	A	12.000
MATH 224	**Elem Differential Equations**	3 00	3 00	A	12.000
STAT 313	**Statistics for Experimenters**	3 00	3 00	A	12.000
CHIN 102	**Elementary Chinese II**	4 00	4 00	A	16.000
POSC 373	**Politics of The European Union**	3 00	3 00	A	12.000
USNA 288N	**Engineering Water**	3 00	3 00	A	12.000

Term Honor: Dean's High Honors

			Attempted	Earned	Averaged	Points
Term GPA:	4.000	Term Totals	19 00	19 00	19 00	76.000
Cum GPA:	4.000	Cum Totals	38 00	38 00		152.000

Fall 2017

The purpose of this document is grade reporting only. Since it may be incomplete, it should never be used as a substitute for an official transcript.

[redacted] [redacted]

Student Name: Sruthi Priyal Venkatachalam

Case Western Reserve University
Unofficial Transcript

Course	Description	Attempted	Earned	Grade	Points
STAT 325	Data Analysis & Linear Models	3.00	3.00	A	12.000
CHIN 201	Intermediate Chinese I	4.00	4.00	A	16.000
ECON 326	Econometrics	4.00	4.00	A	16.000
POSC 370H	China's Foreign Policy	3.00	3.00	A	12.000
RLGN 234	The Ramayana	3.00	3.00	A	12.000
POSC 395	Special Projects	2.00	2.00	A	8.000

Term Honor: Dean's High Honors

			Attempted	Earned	Averaged	Points
Term GPA:	4 000	Term Totals	19.00	19.00	19.00	76.000
Cum GPA:	4 000	Cum Totals	57.00	57.00		228.000

Spr 2018

Course	Description	Attempted	Earned	Grade	Points
CHIN 202	Intermediate Chinese II	4.00	4.00	A	16.000
MATH 304	Discrete Mathematics	3.00	3.00	A	12.000
POSC 374	Politics of Devel/Global South	3.00	3.00	A	12.000
ECON 338	Law and Economics	3.00	3.00	A	12.000
PHED 65B	Team Build/Leadershp (2nd half	0.00	0.00	P	0.000
POSC 378	International Relations Theory	3.00	3.00	A	12.000
USSY 293C	State, Legitimacy, Insurgency	3.00	3.00	A	12.000

Term Honor: Dean's High Honors

			Attempted	Earned	Averaged	Points
Term GPA:	4 000	Term Totals	19.00	19.00	19.00	76.000
Cum GPA:	4 000	Cum Totals	76.00	76.00		304.000

Fall 2018

Course	Description	Attempted	Earned	Grade	Points
CHIN 301	Advanced Chinese I	4.00	4.00	A	16.000
STAT 345	Theoretical Statistics I	3.00	3.00	A	12.000
ANTH 102	Being Humn Intr Soc/Cul Anth	3.00	3.00	A	12.000
DSCI 351	Exploratory Data Science	3.00	3.00	A	12.000
PQHS 431	Statistical Methods I	3.00	3.00	A	12.000
PHED 108	Fencing-All Levels	0.00	0.00	P	0.000

Term Honor: Dean's High Honors

			Attempted	Earned	Averaged	Points
Term GPA:	4 000	Term Totals	16.00	16.00	16.00	64.000
Cum GPA:	4.000	Cum Totals	92 00	92 00		368.000

Spr 2019

Course	Description	Attempted	Earned	Grade	Points
STAT 326	Multivariate Anlys & Data Mng	3 00	3 00	A	12.000
STAT 437	Stochastics Time Series	3 00	3 00	A	12.000
STAT 346	Theoretical Statistics II	3 00	3 00	A	12.000
MATH 201	Intro to Linear Alg for Appl	3 00	3 00	A	12.000
DSCI 353	Data Sci Models & Prediction	3 00	3 00	A	12.000
PHED 50B	Personal Safety Awareness-2nd	0 00	0 00	P	0.000

Term Honor: Dean's High Honors

			Attempted	Earned	Averaged	Points
Term GPA:	4.000	Term Totals	15 00	15 00	15 00	60.000
Cum GPA:	4.000	Cum Totals	107 00	107 00		428.000

			Attempted	Earned	Averaged	Points
Career Totals						
Cum GPA	4.000	Cum Totals	140.00	140.00	140.00	560.000

Total Credits Earned 176 00

Non-Course Milestones
- Writing Portfolio Complete

End of Undergraduate Record

The purpose of this document is grade reporting only. Since it may be incomplete, it should never be used as a substitute for an official transcript.

[redacted] [redacted]
Student Name: Sruthi Priyal Venkatachalam

Case Western Reserve University
Unofficial Transcript

12/01/2020

Degrees/Credentials Earned

Degree/Credential: Master of Arts
Date Awarded: 05/17/2020
Plan: Military Ethics

Academic Program History

Program: Military Ethics (MA)
Completed Program
Military Ethics (MA-B) Masters

Total Credits Earned 33.00

End of Graduate Record

Beginning of Graduate Record

Fall 2019

Course	Description	Attempted	Earned	Grade	Points
INTL 399	INTL Colloquium	3.00	3.00	A	12.000
PHIL 417	War and Morality	3.00	3.00	A	12.000
LAWS 5118	International Law Research Lab	3.00	3.00	A	12.000
LAWS 5121	Intl Criminal Law & Procedure	3.00	3.00	A	12.000
LAWS 4101	International Law	3.00	3.00	A	12.000

			Attempted	Earned	Averaged	Points
Term GPA:	4 000	Term Totals	15.00	15.00	15.00	60.000
Cum GPA:	4 000	Cum Totals	15.00	15.00		60.000

Spr 2020

Course	Description	Attempted	Earned	Grade	Points
PHIL 436	Military Ethics and Int'l Law	3.00	3.00	A	12.000
PHIL 501	Military Ethics MA Capstone	6.00	6.00	A	24.000
PHIL 405	Ethics	3.00	3.00	A	12.000
LAWS 5116	International Human Rights	3.00	3.00	A	12.000
PHIL 484	Ethics and Public Policy	3.00	3.00	A	12.000

			Attempted	Earned	Averaged	Points
Term GPA:	4 000	Term Totals	18.00	18.00	18.00	72.000
Cum GPA:	4 000	Cum Totals	33.00	33.00		132.000

Career Totals			Attempted	Earned	Averaged	Points
Cum GPA	4 000	Cum Totals	33.00	33.00	33.00	132.000

The purpose of this document is grade reporting only. Since it may be incomplete, it should never be used as a substitute for an official transcript.

April 21, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to highly recommend Sruthi Venkatachalam for a clerkship in your chambers.

Sruthi grew up in the Columbus, OH area, the daughter of Indian immigrants. She attended Case Western Reserve University, where excelled, earning a BA in Statistics and International Studies summa cum laude and an MA in Military Ethics. She came to Yale Law School after working for nearly two years at the FBI.

I got to know Sruthi as a student in two classes—International Law and Intelligence Law, both of which she took in Spring 2022. In International Law, a large course, Sruthi was a regular participant in class, and she wrote a very strong exam, for which she received an H. In Intelligence Law, a seminar that I co-taught with Bob Litt, former General Counsel at the Office of the Director of National Intelligence, Sruthi wrote two essays. The first evaluates the current case law on the use of the official acknowledgement doctrine to rebut the Glomar response (a response to a request for information that will "neither confirm nor deny" the existence of the information) and argues that a broader, more expansive reading of the doctrine is more in line with the purpose of the doctrine and with the Freedom of Information Act. The second paper examines the Augmenting Intelligence using Machines strategy being deployed to incorporate artificial intelligence into the intelligence community. It explores the transparency issue in artificial intelligence and the dilemma it poses for the intelligence community, and it proposes integrating mandatory impact assessments into the existing oversight regime to help overcome this challenge. Both essays were extremely well researched and very well written, and she again received an H for the course. (On the second, Bob wrote that he learned from it—which is high praise, as he is as informed in this area as anyone in the country.) The writing skill she demonstrated in the class gives me confidence that Sruthi would be an excellent law clerk. This is further reinforced by her work at Just Security, where she has been a senior student editor—a very competitive position given only to students who demonstrate excellent writing and editing skills.

After clerking, Sruthi is interested in pursuing a career in public service. As I mentioned at the outset, she worked for almost two years at the FBI. In her summers during law school, she gained further experience as an intern at the Department of Justice in the Public Integrity Section and as a Summer Associate at Skadden Arps. She has also worked as an extern for Judge Victor Bolden, which has given her valuable insight into legal practice. These experiences have prepared her to be an excellent law clerk.

For these reasons, I highly recommend Sruthi for a position as a law clerk. If you have any questions, please contact me at oona.hathaway@yale.edu, or by phone at 203-436-8969 or via my cell at 203-343-8482.

Sincerely,

Oona A. Hathaway
Gerard C. and Bernice Latrobe Smith Professor of International Law

April 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to you on behalf of Sruthi Venkatachalam, a third-year student at the Yale Law School. Sruthi will graduate this spring, after a most distinguished career at the Law School. She has applied for a clerkship in your chambers. Sruthi has my enthusiastic support.

Last fall, Sruthi was one of two Coker Fellows assisting me in teaching my class in constitutional law. Constitutional law is one of four courses that first-term students at Yale are all required to take. My class was what we call a “small group”—a seminar-sized class of sixteen. Each first-term student takes one of his or her required classes in a small-group format. The idea is to allow for more conversational interaction and to give students the opportunity to develop a closer relation with one of their professors. Those teaching small groups are allowed to choose two third-year students to assist them. I had more than sixty applicants for my two Coker positions. Sruthi was one of the two I chose. I was thrilled that I did.

Over the course of the term, and then after, Sruthi and I met often to discuss matters pertaining to the small group. Sometimes the issues were procedural or even personal. When should we schedule a make-up class? What is the best day to plan an outing to Block Island, where I live in the summer and fall? How is this or that particular student doing? Are there any reasons to be concerned?

Sometimes the issues were substantive. What is the best way of introducing students to the ins and outs of the Commerce Clause, and how can the cases from Gibbons to Sibelius be most effectively used as a window into (some of) the complexities of American federalism? Which of the many school desegregation cases that followed Brown are the best ones to illustrate the dimensions of the problem and the Supreme Court’s shifting perspective(s) on it?
On the personal side, Sruthi was unfailingly wise and kind. She knew what our students needed and how best to help them. It is not an exaggeration to say that by the end of the term, they all loved her. She was always available; always understanding; always clear in her directions and advice. My first-term students could not have had a better third-year friend.

On the substantive side, my many, many conversations with Sruthi were invariably stimulating and helpful to me. Sruthi has a first-rate mind. She thinks with uncommon clarity and range. When I spoke with her about the cases on our syllabus, she always had a sure grasp of their details, down to the molecular level, and a highly intelligent, often imaginative, understanding of their implications. I do not have a shadow of a doubt that Sruthi could have taught the course herself. I would have enjoyed being her student.

Toward the end of the term, the students were required to brief and argue a case then before the Supreme Court (303 Creative v. Eleni). Sruthi and her co-Coker chose the case; worked intensively with each student in the class on his or her brief; and joined me on the bench for the oral arguments in the final week of the semester.

The briefs were uniformly excellent. In part, this was the result of the effort and intelligence the students themselves put into their work. But I know to a certainty that the briefs would not have been nearly as good, or the arguments as forceful, if Sruthi had not devoted weeks of her time to helping the students write and prepare. They all recognized this and at our farewell dinner, joined in a raucous and sustained round of applause for their two magnificent Cokers.

Everything I have seen of Sruthi—and I have seen a great deal—leads me to believe, with utter confidence, that she will be a splendid law clerk. Sruthi is brilliant; hardworking; punctual; warm-hearted and generous of spirit. What else could a judge want? What else could anyone want? If Sruthi joins you in your chambers, you will be as pleased with your decision as I have been with mine to ask her to be my Coker Fellow last fall.

Sincerely,

Anthony Kronman

Anthony Kronman - anthony.kronman@yale.edu - 203-432-4934

April 20, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Sruthi Venkatachalam who is applying for a clerkship in your chambers.

Sruthi took an introductory constitutional law course with me and then served has served as my research assistant over the last year and was totally devoted in the role. She worked on several projects. Most were historical in focus. One project examined how Burger Court decisions on wealth inequality evolved in the 1970s for which Sruthi did archival work. Another project involved research into the social movement roots of “reasons bans” on abortion (prohibiting abortion on the basis of race or sex or disability). She has also researched the Meese Justice Department’s early involvement in originalism in the 1980s. Sruthi helped proofed the manuscript of my recent article The Politics of Memory. Sruthi did meticulous work on each of these projects. None has involved writing a memo on a question of law, however.

It has been a great pleasure to with Sruthi. She is responsible and precise in handling research assignments and is full of enthusiasm and curiosity of a kind that I think would make her an valuable assistant in chambers, whether working independently or in teams.

Please call me at 203-661-6181 if I can be of further assistance in your decision.

Sincerely,

Reva Siegel

Reva Siegel - reva.siegel@yale.edu - 203-432-6791

Sruthi Venkatachalam
Writing Sample
Advanced Written Advocacy Assignment Four

This brief was written for the final assignment in Advanced Written Advocacy.

The basic factual premise is as follows:
F.M., a minor who attends Boston Collaborative High School (BCHS), posted a short video on TikTok. In the video, she says "I wish we were still on summer break. If just one of you would call the school and threaten to shoot a few teachers the next day, we'd get the day off. And if someone would make that threat every night, we'd never need to go to school." She then laughed and did a TikTok dance-move. F.M. did not identify which school she attended in the video. She did not specify where she lived, but her username, "BostonFaith," indicated her location. Many of her followers were also BCHS students who recognized her as their classmate. Another student at the school, whose mom was a math teacher at BCHS, saw the video and shared it with his mom. She then forwarded a copy of the video to the school's principal, Ruth Tran.
The following day, Principal Tran called F.M.'s mother to state that F.M. had made threatening remarks and would be suspended for two weeks, effective immediately. F.M. filed a motion for a TRO to block the suspension.

This assignment is an appellate argument briefing the issue of whether a TRO should be granted. We were told only to address the substantive issue of whether the plaintiff would succeed on the merits of securing a TRO. The assignment assumes that another attorney would brief whether a TRO could be appealed on interlocutory appeal. This sample covers one factor of the TRO analysis, the likelihood of success on the merits.

This brief supports the position of BCHS and the City of Boston. It follows a lower court decision where the BCHS succeeded on the merits and F.M. appealed the ruling.

INTRODUCTION

This case concerns Boston Collaborative High School's ("BCHS") obligation to create a secure environment for its students and staff. Such a responsibility requires BCHS to impose sensible and proportionate punishments on those who threaten that environment. F.M., a BCHS student, created a video on the popular social media site TikTok in which she suggested students should make threats against teachers to force school cancellations. J.A. 35. Upon being made aware of the TikTok, BCHS' principal Ruth Tran ("Tran") suspended F.M. for two weeks for her "threatening remarks." J.A. 36.

F.M. filed a motion for a temporary restraining order ("TRO") to halt the suspension. J.A. 23-33. In her motion, the Plaintiff argued the school's actions infringed upon her First Amendment rights. J.A. 27-33. The district court rejected this argument. It noted that speech like F.M.'s video is "plainly within the realm of speech schools *can* and *should* act upon" while the failure to do so may be "grossly irresponsible." J.A. 45 (emphasis added). The plaintiff filed a timely interlocutory appeal seeking to reverse the lower court opinion. J.A. 52-70.

The motion should not be granted since the Plaintiff has failed to prove a likelihood of success on the merits. The Plaintiff's arguments are wrong as a matter of law. Schools have the authority to regulate speech, like F.M.'s TikTok, that would "materially and substantially interfere" with school activities. *See Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 514 (1969). The fact this speech occurred off-campus in no way alters the conclusion. The Supreme Court, too, has emphasized that in matters of school discipline, judges must give deference to school administrators. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Col. Of Law v. Martinez*, 561 U.S. 661, 686 (2010). For these reasons, the Defendants respectfully request that this Court affirm the district court's judgement and uphold F.M.'s suspension.

STATEMENT OF FACTS

School gun violence occurs with unfortunate frequency and is one of the most serious threats school administrators face. On January 7, 2023, a six-year old boy shot a teacher in his elementary school. Livia Albeck-Ripka & Eduardo Medina, *6-Year-Old Shoots Teacher at Virginia Elementary School*, N.Y. Times, Jan. 11, 2023. On May 24, 2022, a former student of Robb Elementary School in Uvalde, Texas murdered nineteen students and two teachers. Rick Rojas & Edgar Sandoval, *The Excruciating Echo of Grief in Uvalde*, N.Y. Times, Aug. 8. 2022. Since 1999, over 331,000 children from 354 schools have been directly impacted by school shootings. John Woodrow Cox et.al, *School Shooting Database*, Wash. Post, Jan. 9. 2023. Administrators must be vigilant to ensure their school is not the scene of the next tragedy. It is with this knowledge that Tran acted.

F.M. is a 17-year-old student at BCHS. She maintains a public TikTok profile, BostonFaith, where she posts short videos. J.A. 1. She has more than 500 followers, including all twenty-three of her classmates and dozens of other BCHS students. J.A. 2-3. On November 1, 2022, F.M. posted a video on her TikTok where she said, "I wish we were still on summer break. If just one of you would call the school and *threaten to shoot a few teachers* the next day, we'd get the day off. And if someone would make that threat every night, we'd never need to go to school." J.A. 34-35 (emphasis added). She then laughed and did a TikTok dance move. J.A. 34-35.

Another student at BCHS, whose mom is a math teacher at the school, was alarmed by the video. In a declaration he submitted, he stated:

> I didn't think that F.M. was seriously going to threaten the school, but she sent it out to everyone. I can't say the same for every other kid at this school who saw the video. It wouldn't be a huge deal except F.M. did essentially talk about people threatening a school shooting. I felt like I had to warn my mom because I'd rather be safe than sorry. I didn't want to feel like I could have done something if the worst happened, and someone took it too far.

J.A. 5. Based on these concerns, he passed the video along to his mom, who reported the video to Tran. J.A. 5.

Principal Tran watched the Tiktok and was alarmed. It had been viewed over 200 times, with several users commenting on the content. J.A. 13-14. One TikTok user, commented "TOTALLY! Gonna [sic] do Burcham[1] first, maybe our test will get cancelled or we'll get a sub or something." J.A. 14. Another user, commented "PLEASE. I'll call today, whos [sic] doing tomorrow? Tran is going to FREAK." J.A. 14. Later investigations revealed that these comments were posted by two BCHS students.

Tran responded to the TikTok with standard procedures. Under §5.2 of the Student Handbook, BCHS holds a strict "zero tolerance policy" towards "any act, threat, or suggestion of violence against BCHS, teachers, students, or any member of the BCHS community." J.A. 4. Tran correctly determined that F.M.'s video constituted a threat of violence to the school's teachers and that F.M. had violated §5.2 of the Student Handbook. On November 2, 2022, Tran called F.M.'s mother to inform her that F.M. had made "threatening remarks against the school community" and that, as a result, F.M. was suspended for two weeks, effective immediately. J.A. 36.

LEGAL STANDARD

Courts must weigh four factors when considering whether to grant a TRO: the likelihood of success on the merits, whether the plaintiff will suffer irreparable harm if relief is denied, a comparison between harm to the plaintiff if preliminary relief is not granted and harm to the defendant if the relief is granted, and the effect of the preliminary relief on the public interest. *Akebia Therapeutics, Inc. v. Azar*, 976 F.3d 86, 92 (1st Cir. 2020).

[1] Joanna Burcham is a math teacher at BCHS high school.